

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1930

No. 5157

827

LORING A. COVER, JOHN M. STECK, AND HARRY
R. KERN, EXECUTORS OF THE ESTATE OF
THOMAS COVER, DECEASED, APPELLANTS,

David Burnet,

vs.

~~ROBERT H. LUCAS~~, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED FEBRUARY 28, 1930.

PRINTED APRIL 18, 1930.

Court of Appeals of the District of Columbia

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LORING A. COVER, JOHN M. STECK, AND HARRY
R. KERN, EXECUTORS OF THE ESTATE OF
THOMAS COVER, DECEASED, APPELLANTS,

vs.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL
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Court of Appeals of the District of Columbia

No. 5157.

LORING A. COVER, JOHN M. STECK, and HARRY R. KERN, Executors of the Estate of Thomas Cover, Deceased, Appellants,

vs.

ROBERT H. LUCAS, Commissioner of Internal Revenue.

1

Docket No. 34842.

LORING A. COVER, JOHN M. STECK, HARRY R. KERN, Executors of the Estate of Thomas Cover, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

Taxpayer: Swager Sherley, Esq.

Commissioner-: J. D. Foley, Esq., W. F. Gibbs, Esq.,
Lloyd W. Crearon, Esq.

Docket Entries.

1928.

Feb. 9—Petition received and filed. Taxpayer notified.
(Fee Paid.)

“ 10—Copy of Petition served on General Counsel.

Apr. 7—Answer filed by G. C.

“ 11—Copy of answer served on taxpayer. Gen. Calendar.

1929.

Feb. 16—Stipulation of facts filed (1).

“ 19—Hearing set 3-18-29.

Mar. 11—Motion to continue hearing to last week in March, 1929, filed by taxpayer.

“ 12—Motion granted for hearing April 1, 1929.

1—5157a

- Apr. 1—Hearing had on merits before Mr. Lansdon. Submitted. Stipulations filed of record. Briefs due 5-1-29. Reply briefs due 5-15-29.
- “ 9—Transcript of hearing 4-1-29 filed.
- May 1—Motion for extension of time to 5-10-29 for preparation of brief filed by General Counsel.
- “ 1—Granted. Both parties.
- “ 10—Brief filed by taxpayer.
- “ 10—Brief filed by General Counsel. Copy served.
- “ 13—Copy of brief served on General Counsel.
- Oct. 31—Findings of fact and opinion rendered. (Wm. C. Lansdon, Div. 8.) Decision will be entered under Rule 50.
- Dec. 9—Notice of settlement filed by General Counsel.
- “ 11—Hearing set 6-8-30 under Rule 50.
- 1930.
- Jan. 8—Hearing held before under Rule 50—Assigned to Mr. Lansdon for order.
- “ 10—Decision entered. Wm. C. Lansdon, Div. 8.
- Feb. 12—Supersedeas bond for \$13,342.04 approved and ordered filed.
- “ 12—Stipulation of venue filed—Court of Appeals of D. C.
- “ 12—Petition for review by Ct. of Appeals of D. C. with assignments of error filed by taxpayer.
- “ 12—Proof of service filed.
- “ 12—Præcipe with proof of service thereon filed.

Now, February 26, 1930, the foregoing Docket Entries certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

2

Filed Feb. 9, 1928.

The United States Board of Tax Appeals.

Docket No. 34842.

LORING A. COVER, JOHN M. STECK, HARRY R. KERN, Executors of the Estate of Thomas Cover, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition.

The above named petitioners hereby petition for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, dated December 12, 1927, (Symbols, MT:ET:CL:1488-EFV), and as a basis of this proceeding allege as follows:

1. Petitioner, Loring A. Cover, is a resident of the City of Baltimore, State of Maryland, and petitioners, John M. Steck and Harry R. Kern, are residents of the City of Winchester, State of Virginia.

2. That the above named Thomas Cover, departed this life testate on March 26, 1926, and was, at and before the time of his death, a citizen of the State of Virginia and a resident of the City of Winchester in said State. That in and by the terms of his last will and testament, duly admitted to probate in the Corporation Court of the City of

Winchester, State of Virginia, petitioners, Loring A. Cover, John M. Steck and Harry R. Kern, were named as executors of the estate of said decedent; that petitioners accepted the trust imposed upon them by said last will and testament of the said Thomas Cover, deceased, and on April 19th, 1926, were duly qualified as executors of the estate of Thomas Cover, deceased, in and by the Corporation Court of the City of Winchester, Virginia, aforesaid, and are now and ever since their qualification aforesaid have been such executors. A duly authenticated copy of the record of the qualification of petitioners as such executors is attached hereto, marked "Exhibit A."

3. The notice of deficiency (a copy of which is attached hereto, marked "Exhibit B") was mailed to petitioner,

John M. Steck, on December 12, 1927, as acting executor of the Estate of Thomas Cover, and states that the deficiency determined thereby amounts to \$33,355.07.

4. The taxes in controversy are estate taxes against the Estate of Thomas Cover, deceased, who died March 26, 1926, and are more than \$10,000.00, to-wit, \$33,355.07.

5. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The determination by the Commissioner of Internal Revenue that under and by virtue of subdivision *d*, of Section 302 of the Revenue Act of 1926 there should be included as part of the taxable estate of the said Thomas Cover, deceased, certain stocks, bonds, and other securities of the value of \$391,920.78, being the corpus of a trust estate originally created by said Thomas Cover by deed of trust executed January 17th, 1918 to the Safe Deposit and Trust Company of Baltimore, a body corporate of the State of Maryland, together with certain accrued income thereon amounting to the sum of \$5,249.80:

(b) In refusing to hold that said corpus of the trust aforesaid and the accrued income aforesaid was and is no part of the estate of Thomas Cover, deceased, and that there was no interest therein where the enjoyment thereof was subject at the date of the death of said Thomas Cover to any change through the exercise of a power either by the said Thomas Cover alone or in conjunction with any person, to alter, amend or revoke within the meaning of subdivision *d* of Section 302, or any other provision of the Revenue Act of 1926.

6. The facts upon which petitioners rely as the basis of this proceeding are as follows:

(a) On January 17th, 1918, Thomas Cover executed, and the Safe Deposit and Trust Company of Baltimore accepted, a certain deed of trust whereby said Cover placed in trust with said Trust Company for the benefit of his children then living and the grandchildren of his deceased children, certain stocks, bonds and other securities enumerated in a schedule thereto attached, and by supplement thereto dated January 8th, 1919, added further property thereto. A copy of said deed of trust of January 17th, 1918 is filed herewith as part hereof, marked "Exhibit C".

5 (b) Petitioners state that by the terms of said deed of trust of January 17th, 1918, the settler, said Thomas Cover, reserved the right to alter, amend, or modify the trusts thereby created without the right to withdraw any part of the principal, any such change, alteration or modification to be evidenced by a paper writing under his hand and seal and lodged with said trustee during settler's life. For the exact terms and scope of said reserved powers reference to said deed is made.

(c) Petitioners state that subsequently, on January 19, 1919, settler, said Thomas Cover, by deed of alteration, authorized the trustee, said Safe Deposit and Trust Company of Baltimore to make certain payments from the principal of said trust to certain of Settler's grandchildren upon their request, the grandchildren receiving such sums to be charged interest thereon, and upon the termination of the trusts originally created, such advances to be charged against the shares of said grandchildren if living, or if deceased against the person who shall be entitled to the share of the principal which would have been payable to such grandchild if then living, all of which more particularly appears in said deed of alteration, to which reference is made and a copy of which is filed herewith and made part hereof, marked "Exhibit D".

(d) Petitioners state that at the time of the death of said Thomas Cover, to wit, March 26, 1926, said trust was in full force and effect, and the trustee, the said Safe Deposit and Trust Company, held as the entire corpus of said trust, the following named securities which, as has been determined by the Commissioner of Internal Revenue, had at said date the value set opposite each security, to wit:

	Value.
\$20,000 Pocahontas Consolidated Collieries Co. 5's	\$18,200.00
\$20,000 Indianapolis Northern Traction Co., 1st Mortgage 5's	6,000.00
\$10,000 Brooklyn Manhattan Transit Corp. sinking fund 6's, series A's	9,312.50
\$20,000 Chicago City Railway Co., 1st mortgage 5's	13,525.00

		Value.
\$10,000	Chicago Railways Co., 1st mortgage 5's	6,762.50
\$10,000	Chesapeake & Ohio Railway Co. 4½'s	9,850.00
\$17,000	Consolidated Gas, Electric Light & Power Co., 1st mortgage 6's....	18,232.50
\$100,000	Atlantic Coast Line Railroad Co., 1st cons. mortgage, 4's	93,625.00
\$50,000	Maryland Electric Railways Co., 1st mortgage 5's	48,250.00
\$68,500	United States 4th Liberty Loan, 4½'s	70,148.28
7		
\$25,000	Virginia Railway Co. 1st mortgage 5's	25,312.50
\$13,000	Federal Land Bank of Baltimore 5's	13,438.75
\$7,000	Federal Land Bank of Berkeley 5's	7,236.25
190	shares Norfolk & Western Railway, common	27,027.50
\$25,000	Mortgage note of Augustus and Marie Sattler, dated December 12, 1925	25,000.00
Total		\$391,920.78

(c) That on said date there had accrued income arising from said securities in the sum of \$5,249.80.

7. Petitioners state that by virtue of said deeds of trust aforesaid, the title to said property and the income resulting therefrom passed irrevocably and forever from the said Thomas Cover to the said Safe Deposit and Trust Co. of Baltimore, in trust, to hold the corpus of said trust estate, collect the income and distribute the same among the living children of the settler, and the descendants of those dead per stirpes, and subsequently upon the death of all the children of the settler, and the coming of the age of twenty-one of the youngest grandchild living at the death of the settler, said trust ceases and the principal of the trust estate is to be divided among all of settler's descendants then living, per stirpes.

8. Petitioners state that said securities and the accrued income aforesaid were and are no part of the estate of

said decedent Thomas Cover, and the transfer of title to same by said deeds of trust does not constitute such a transfer as is embraced within the provisions of subdivision *d* of Section 203 of the Revenue Act of 1926 or of any other provision of said law, and is not taxable as part of the estate of said decedent.

8 9. Petitioners state that said deeds of trust were made and the transfers of the property embraced therein affected long prior to the passage of either the Revenue Act of 1924 or the Revenue Act of 1926, to wit, on January 17, 1918 and January 8, 1919, and at the time made were lawful transfers of title not made in contemplation of death, and subject to no tax by any law of the United States; that if subdivision *c* or subdivision *d* of Section 203 of the Revenue Act of 1926 or any other provision of said act be so construed as to embrace within its terms said transfers and to impose upon the estate of said decedent, Thomas Cover, a tax because of such transfers, such provision is arbitrary, invalid and unconstitutional as contrary to the due process clause of the Fifth Amendment of the Constitution of the United States.

Wherefore the petitioners pray that this Board may hear the proceedings, and determine that said securities and said accrued income were and are no part of the estate of said Thomas Cover, deceased, that said deficiency of \$33,355.07 is incorrect and invalid, that the net taxable estate of said Thomas Cover be determined as \$1,203,339.77 and the estate tax computed thereon and the proper credit on account of all state inheritance taxes be made, and
9 the true deficiency, if any, ascertained, and for all other and proper relief.

SWAGAR SHERLEY,
Counsel for Petitioner.

Metropolitan Bank Bldg., Washington, D. C.

DISTRICT OF COLUMBIA, ss:

Loring A. Cover, being duly sworn, says that he is one of the executors of the Estate of Thomas Cover, deceased, and one of the petitioners herein; that he is duly authorized to verify the foregoing Petition; that he has read the same and is familiar with the statements contained therein, and

the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

LORING A. COVER.

Subscribed and sworn to before me this 9th day of February, A. D., 1928.

[Seal of Josephine L. Hayes, Notary Public, District of Columbia.]

JOSEPHINE L. HAYES,
Notary Public.

10

EXHIBIT "B".

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

MT-ET-C1.—1488-EFV.

District of Virginia.

Estate of Thomas Cover.

Date of death: March 31, 1926.

Dec. 12, 1927.

John M. Steck,

Acting Executor Estate of Thomas Cover,
Winchester, Virginia.

SIR:

The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of July 30, 1927. The deficiency hereby determined amounts to \$33,355.07, and is fully explained in the attached statement, consisting of four pages, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60 day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid account of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,
(Sgd.)

D. H. BLAIR,
Commissioner.

MEL.

Enclosures: Statement, Waiver—Form 890.

11 MT-ET-C1-1488-EFV.
District of Virginia.
Estate of Thomas Cover.

The protest arises in regard to the following items:

Gross Estate.

		Tentatively determined.	Determined.
Mortgages, notes, cash, and insurance. Returned.			
Item 24.....	\$00.00	\$11,500.00	\$4,571.43
Transfers:			
\$20,000 Pocahontas Consolidated Col- lieries Co. 5's.....	00.00	18,200.00	18,200.00
\$20,000 Indianapolis Northern Trac- tion Co., 1st Mortgage 5's..	00.00	6,000.00	6,000.00
\$10,000 Brooklyn Manhattan Transit Corp. sinking fund 6's, series A's	00.00	9,312.50	9,312.50
\$20,000 Chicago City Railway Co., 1st mortgage 5's.....	00.00	13,525.00	13,525.00

	Returned.	Tentatively determined.	Determined.
Mortgages, notes, cash, and insurance.			
\$10,000 Chicago Railways Co., 1st mortgage 5's.....	00.00	6,762.50	6,762.50
\$10,000 Chesapeake & Ohio Railway Co. 4½'s.....	00.00	9,850.00	9,850.00
\$17,000 Consolidated Gas, Electric Light & Power Co., 1st mortgage 6's.....	00.00	18,232.50	18,232.50
12			
\$100,000 Atlantic Coast Line Railroad Co., 1st cons. mortgage 4's.	00.00	93,625.00	93,625.00
\$50,000 Maryland Electric Railways Co., 1st mortgage 5's.....	00.00	48,250.00	48,250.00
\$68,500 United States 4th Liberty Loan 4½'s.....	00.00	70,148.28	70,148.28
\$25,000 Virginia Railway Co., 1st mortgage 5's.....	00.00	25,312.50	25,312.50
\$13,000 Federal Land Bank of Baltimore 5's.....	00.00	13,438.75	13,438.75
\$7,000 Federal Land Bank of Berkeley 5's.....	00.00	7,236.25	7,236.25
190 shares Norfolk & Western Railway common.....	00.00	27,027.50	27,027.50
13			
\$25,000 Mortgage note of Augustus and Marie Sattler, dated December 12, 1925.....	00.00	25,000.00	25,000.00
Accrued income.....	00.00	5,249.80	5,249.80

The information before the Bureau shows that the property given to secure the bond of Isaac Fry was sold at public auction, and that the amount received therefor was \$4,571.43. Adjustment is made herein accordingly.

After a careful consideration of all the evidence before the Bureau relating to the transfers in question, it is found that such transfers are properly taxable under Subdivision (d) of Section 302 of the Revenue Act of 1926. Your protest in this respect is therefore rejected.

In view of the foregoing determination, the following findings are made:

	Returned.	Tentatively determined.	Determined.
Gross estate.....	\$1,317,570.12	\$1,730,759.15	\$1,723,830.58
Deductions	121,434.41	123,320.23	123,320.23
Net estate.....	1,196,135.71	1,607,438.92	1,600,510.35
14 Tax	\$64,190.86	\$98,169.50	\$97,545.93
Deficiency		33,978.64	33,355.07
Credit for State inheritance taxes	51,352.69	51,352.69	51,352.69
Net tax payable.....	12,838.17		46,193.24
Deficiency proposed for assessment			33,355.07

The portion of the deficiency proposed for assessment is \$33,355.07, together with interest thereon at the rate of six per centum per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of waiver, Form 890, whichever is the earlier.

15

EXHIBIT "C."

Know all men by these presents:

That I, Thomas Cover, of Winchester, Virginia, do, out of the love and affection which I bear to my children and descendants and for the purpose of providing an income for them, hereby give, grant and assign unto the Safe Deposit and Trust Company of Baltimore, a body corporate of the State of Maryland, the securities enumerated on the Schedule hereto attached and made part hereof, to be held by it for the following uses and trust purposes, that is to say:

To collect the income therefrom and after paying thereout all taxes and charges, including a commission to the Trustee for all services under this deed of five per cent (5%) on the amount of income collected, to pay the remainder of such income on December 1st, 1918 and every six months thereafter to my children and the descendants of my deceased children living from time to time as said income is payable, such payments to be per stirpes; provided, however, that any surviving wife or surviving husband of a deceased child of mine shall, during her or his unmarried life, receive on the first days of each June and December succeeding the death of such deceased child of mine one-third of one-eighth of the net income from the Trust Estate, to be deducted from the respective shares of the income of the descendants of such deceased children, if they shall leave descendants, and, if not, then from the income of the Trust Estate. The provision for the wives and husbands of my children herein made shall be operative only if said wives and husbands shall actually have lived

16 upon amicable and harmonious terms with my son or daughter, as the case may be, for at least one year immediately preceding the time of the death of my son or daughter, and the Trustee shall assume they have so lived together unless it shall receive notice to the contrary from me or any one of my children.

The above Trust shall continue until the death of all my children and until the youngest grandchild of mine living at my death shall reach the age of twenty-one years, when it shall cease and the Trustee shall divide the principal of the Trust Estate among all of my descendants then living, per stirpes.

If at the termination of the Trust as above provided there shall then be living wives or husbands of any deceased children of mine, the Trustee shall retain out of the shares from which such wives or husbands shall have been receiving the income hereinbefore provided to be paid them, as much of the principal of such share as may be necessary to provide for such payments, and at their respective deaths or remarriages I direct said Trustee to divide the principal thus retained, amongst those entitled (as above provided) their personal representatives and assigns.

Power is hereby conferred upon said Trustee to vary the investments of the Trust Estate in such manner as it may deem desirable, except that during my life only with my approval, and for the convenient management of the Trust, it is authorized to have registered in its name in its sole capacity without defining thereon the Trusts, all registered securities.

All payments hereunder to my children and descendants or other distributees shall be made to them direct,
17 into their own hands and not into the hands of another, whether claiming by their authority or otherwise, provided, however, said Trustee may during the minority of any of my descendants apply their share of the income to their support and education.

I hereby reserve to myself the right, at any time or times during my life, to alter, change or modify the Trusts hereby created, without the right to withdraw any part of the principal; any such change, alteration or modification by me to be evidenced by a paper writing under my hand and seal and lodged with said Trustee during my life-time.

Witness my hand and seal this 17th day of January, A. D., nineteen hundred and eighteen. Executed in duplicate.

(Signed) THOMAS COVER. [SEAL.]

Witness:

RUTH FLETCHER.

Safe Deposit and Trust Company of Baltimore hereby acknowledges receipt of the securities named in the Schedule annexed, and agrees to hold the same upon the Trusts above declared.

SAFE DEPOSIT AND TRUST CO.
OF BALTIMORE,
By J. J. NELLIGAN,
President.

18

EXHIBIT "D".

Know all men by these presents that whereas I, Thomas Cover, by my deed dated January 17, 1918, granted and assigned to the Safe Deposit and Trust Company of Baltimore, under the trusts therein set forth the property therein mentioned (and by supplement thereto dated January 8, 1919 I added further property thereto) which deed provides that the trust should continue until after the death of all of my children and until the youngest grand-child of mine surviving at my death should reach the age of 21 years and should then terminate, and under which deed I reserved to myself the right at any time or times during my life to alter, change or modify the trusts thereby created, without the right to withdraw any part of the principal, any such change, alteration or modification to be evidenced by a paper writing under my hand and seal and lodged with said Trustee during my life.

Now, therefore, in pursuance of the power of alteration so reserved by me, I do hereby direct that the said Safe Deposit and Trust Company of Baltimore, Trustee, shall at any time after January 1, 1925, pay to each of my grandchildren, Thomas Cover Barton, Lewis H. Barton, Jr., and Joseph Marx Barton, Jr., upon his request in writing the sum of Ten Thousand Dollars (\$10,000) out of the principal of said estate, and I confer upon the said Trustee the power to sell such portions of the principal as may be necessary to make such payments.

And I further direct that after each of said three sum of Ten Thousand Dollars has been paid, the said Trustee shall semi-annually on June 1st and December 1st of each year and until the termination of the trust charge the grand-

child receiving said sum, or collect from him, interest
19 at the rate of $4\frac{1}{4}\%$ per annum, the interest so
charged or collected to be brought in and distributed
with the other income from the trust estate and should such
grand-child, so receiving said principal sum of Ten Thou-
sand Dollars, die before the termination of the trust, the
said interest shall be so charged to or collected from the
persons who under the terms of said deed shall be entitled
to that share of the income now payable to him.

That upon the termination of the trusts such of said three
sums of Ten Thousand Dollars each as shall have been paid
to my said three Grand-children shall be brought into the
principal of said estate and in the division thereof charged
against the shares of said grand-children respectively. If
any of them who shall have received said sum of Ten Thou-
sand Dollars be at that time deceased, then the sum so paid
him shall be charged against the persons who shall under
the terms of said deed be entitled to the share of the princi-
pal which would have been payable to such grand-child if
then living.

Witness my hand and seal this 17th day of January,
nineteen hundred and nineteen. Executed in duplicate.

THOMAS COVER. [SEAL.]

Witness:

H. H. M. LEE.

The Safe Deposit and Trust Company of Baltimore ac-
knowledges receipt from Thomas Cover, this 17th day of
January, nineteen hundred and nineteen of the foregoing
Deed of Alteration .

SAFE DEPOSIT AND TRUST COMPANY
OF BALTIMORE.

By JNO. W. MARSHALL, V. P.

Now, February 26, 1930, the foregoing Petition certified
from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

20 Filed Apr. 7, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 34842.

ESTATE OF THOMAS COVER, Deceased; LORING A. COVER, JOHN M. STECK, and HARRY R. KERN, Executors, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Answer.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayers, admits and denies as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits the allegations contained in the paragraph of the petition numbered 3.

4. Admits so much of the paragraph of the petition numbered 4 as alleges that the taxes in controversy are estate taxes against the Estate of Thomas Cover, who died March 31, 1926, and are for more than \$10,000.00, and denies all other allegations contained in said paragraph of the petition numbered 4.

5. Denies that the respondent, in determining the deficiency tax, committed error as alleged in the paragraph of the petition numbered 5.

21 6. (a), (b), (c), (d) and (e). Admits the allegations contained in subdivisions (a) to (e), inclusive, of the paragraph of the petition numbered 6.

7. Denies the allegations contained in the paragraph of the petition numbered 7.

8. Denies the allegations contained in the paragraph of the petition numbered 8.

9. Denies the allegations contained in the paragraph of the petition numbered 9.

10. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is respectfully prayed that the determination of the Commissioner be approved.

(Signed)

C. M. CHAREST,

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Of Counsel:

FRANK T. HORNER,

Special Attorney, Bureau of Internal Revenue.

FTH/RFS/y.

4-6-28.

Now, February 26, 1930, the foregoing Answer certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

22

Filed Feb. 16, 1929.

Before the United States Board of Tax Appeals.

Docket No. 34842.

LORING A. COVER, JOHN M. STECK, HARRY R. KERN, Executors of the Estate of Thomas Cover, Deceased, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation of Facts.

It stipulated by and between the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel of the Bureau of Internal Revenue, and the Executors of the estate of Thomas Cover, deceased, by their attorney, Swagar Sherley, as follows:

I.

That the Deed of Trust of Thomas Cover to the Safe Deposit and Trust Company of Baltimore dated January 17, 1918, a true copy of which is filed as Exhibit C to the petition herein, was executed on that date by the said Thomas Cover and was not made in contemplation of death, and is not such a Deed of Trust as is embraced within the terms of paragraph (c) of section 302 of the Revenue Act of 1926.

II.

That the Deed of Trust of Thomas Cover to the Safe Deposit and Trust Company of Baltimore dated January 17, 1919, a true copy of which is filed as Exhibit D to the petition herein, was executed on that date by *by* the said
23 Thomas Cover and was not made in contemplation of death, and is not such a Deed of Trust as is embraced with the terms of paragraph (c) of section 302 of the Act of 1926.

III.

Whereas it appears that there has been allowed as a credit against the tax claimed by the United States the sum of \$51,352.69 on account of state inheritance taxes paid by said estate to the state of Virginia, such taxes having been imposed upon property other than that constituting the corpus of the said trust; and

Whereas under the law of the state of Virginia, the state inheritance tax is fixed at a sum equal to not less than eighty (80%) per cent of the tax that shall be levied by the United States; and if the action of the Commissioner of Internal Revenue in determining that under and by virtue of subdivision (d) of section 302 of the Revenue Act of 1926 there should be included as part of the taxable estate of the said Thomas Cover, deceased, the stock, bonds and other securities of the value of \$391,920.78, being the corpus of the trust estate created by the said Deed of Trust executed January 17, 1918, by said Thomas Cover, to the Safe Deposit and Trust Company of Baltimore, together with certain accrued interest thereon, amounting to the sum of \$5,249.80, is upheld, and a tax in the nature of a deficiency

over and beyond that returned and paid by the said estate is determined, the state of Virginia will claim, and the said estate of Thomas Cover will have to pay, an additional inheritance tax to Virginia in a sum equal to eighty (80%) per cent of the deficiency determined;

It is agreed by and between the parties hereto that in that event, against any such additional tax imposed by the United States the said estate of Thomas Cover, deceased, shall be entitled to have credited the amount, not in
 24 excess of eighty (80%) per cent of the United States deficiency tax, of any additional estate, legacy, inheritance or succession tax imposed on any of the property so included by the United States in the gross estate of said Thomas Cover, deceased, actually paid to the state of Virginia; Provided, that the same shall have been paid and credit therefor claimed within three years after December 9, 1926, the date the return of the Executors of the estate of Thomas Cover, deceased, was filed with the Collector of Internal Revenue for the District of Virginia.

C. M. CHAREST,

*Attorney for Commissioner of
Internal Revenue, Respondent.*

SWAGER SHERLEY,

*Attorney for the Executors of the Estate
of Thomas Cover, Deceased, Petitioners.*

Now, February 26, 1930, the foregoing Stipulation of Facts certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

25 United States Board of Tax Appeals.

Docket No. 34842.

LORING A. COVER, JOHN M. STECK, and HARRY R. KERN,
Executors of the Estate of Thomas Cover, Petitioners,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated October 31, 1929.

A true copy. Teste:

Where the settlor of a trust reserved the right to alter, change or modify its provisions with the restriction that no

part of the corpus should be withdrawn by him, it is *held* that, substantial rights with respect to the income and corpus of the trust ceasing only at the settlor's death, the corpus plus the accrued income should be included in computing the value of the gross estate for estate tax purposes.

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Swagar Sherley, Esq., for the petitioners.

John D. Foley, Esq., and *Lloyd W. Creason, Esq.*, for the respondent.

The respondent has asserted a deficiency in estate tax of \$33,355.07. The single issue presented for determination is whether the respondent correctly included, in computing the gross estate of decedent, the value of certain property constituting the corpus and accrued income of a trust declared by decedent several years prior to his death.

All of the material facts are embodied in the petition and answer and in a stipulation of facts entered into by the parties, from which we make the following

Findings of Fact

The petitioners are the executors of the estate of Thomas Cover, who died testate March 26, 1926, a resident of Winchester, Va.

On January 17, 1918, Thomas Cover executed a deed of trust to the Safe Deposit and Trust Company of Baltimore, the material provisions of which are as follows:

Know all men by these presents:

That I, Thomas Cover, of Winchester, Virginia, do, out of the love and affection which I bear to my children and descendants and for the purpose of providing an income for them, hereby give, grant and assign unto the Safe Deposit and Trust Company of Baltimore, a body corporate of the State of Maryland, the securities enumerated on the Schedule hereto attached and made part hereof, to be held by it for the following uses and trust purposes, that is to say:

To collect the income therefrom and after paying thereout all taxes and charges, including a commission to the Trustee for all services under this deed of five per cent (5%) on the amount of income collected, to pay the remainder of such income on December 1st, 1918 and every six months thereafter to my children and the descendants of my deceased children living from time to time as said income is payable, such payments to be per stirpes; provided, however, that any surviving wife or surviving husband of a deceased child of mine shall, during her or his unmarried life, receive on the first day of each June and December succeeding the death of such deceased child of mine one third of one-eighth of the net income from the Trust Estate, to be deducted from the respective shares of the income of the descendants of such deceased children, if they shall leave descendants, and, if not, then from the income of the Trust Estate. The provision for the wives and husbands of my children herein made shall be operative only if said wives and husbands shall actually have lived upon amicable and harmonious terms with my son or daughter, as the case may be, for at least one year immediately preceding the time of the death of my son or daughter, and the Trustee shall assume they have so lived together unless it shall receive notice to the contrary from me or any one of my children.

The above Trust shall continue until the death of all my children and until the youngest grandchild of mine living at my death shall reach the age of twenty-one years, when it shall cease and the Trustee shall divide the principal of the Trust Estate among all of my descendants then living, per stirpes.

If at the termination of the Trust as above provided there shall then be living wives or husbands of any deceased children of mine, the Trustee shall retain out of the shares from which such wives or husbands shall have been receiving the income hereinbefore provided to be paid them, as much of the principal of such share as may be necessary to provide for such payments, and at their respective deaths or remarriages I direct said Trustee to divide the principal thus retained, amongst those entitled (as above provided) their personal representatives and assigns.

27 Power is hereby conferred upon said Trustee to vary the investments of the Trust Estate in such manner as it may deem desirable, except that during my life only with my approval, and for the convenient management of the Trust, it is authorized to have registered in its name in its sole capacity without defining thereon the Trusts, all registered securities.

All payments hereunder to my children and descendants or other distributees shall be made to them direct, into their own hands and not into the hands of another, whether claiming by their authority or otherwise, provided, however, said Trustee may during the minority of any of my descendants apply their share of the income to their support and education.

I hereby reserve to myself the right, at any time or times during my life, to alter, change or modify the Trusts hereby created, without the right to withdraw any part of the principal; any such change, alteration or modification by me to be evidenced by a paper writing under my hand and seal and lodged with said Trustee during my life-time.

Witness my hand and seal this 17th day of January, A. D. nineteen hundred and eighteen. Executed in duplicate.

(Signed)

THOMAS COVER. [SEAL.]

Certain other property was added to the trust by a deed dated January 8, 1919, and on January 17, 1919, pursuant to the power of modification reserved in the trust deed of January 17, 1918, the following instrument was executed:

Know all men by these presents that whereas, I, Thomas Cover, by my deed dated January 17, 1918, granted and assigned to the Safe Deposit and Trust Company of Baltimore, under the trusts therein set forth the property therein mentioned (and by supplement thereto dated January 8, 1919 I added further property thereto) which deed provides that the trust should continue until after the death of all of my children and until the youngest grandchild of mine surviving at my death should reach the age of 21 years and should then terminate, and under which deed I reserved to myself the right at any time or times during my life to alter, change or modify the trusts thereby created, without the right to withdraw any part of the principal, any such change, alteration or modification to be evidenced by a

paper writing under my hand and seal and lodged with said Trustee during my life.

Now, therefore, in pursuance of the power of alteration so reserved by me, I do hereby direct that the said Safe Deposit and Trust Company of Baltimore, Trustee, shall at any time after January 1, 1925, pay to each of my grandchildren, Thomas Cover Barton, Lewis N. Barton, Jr. and Joseph Marx Barton, Jr., upon his request in writing the
28 sum of Ten Thousand Dollars (\$10,000) out of the principal of said estate, and I confer upon the said Trustee the power to sell such portions of the principal as may be necessary to make such payments.

And I further direct that after each of said three sums of Ten Thousand Dollars has been paid, the said Trustee shall semi-annually on June 1st and December 1st of each year and until the termination of the trust charge the grandchild receiving said sum, or collect from him, interest at the rate of $4\frac{1}{4}\%$ per annum, the interest so charged or collected to be brought in and distributed with the other income from the trust estate and should such grandchild, so receiving said principal sum of Ten Thousand Dollars, die before the termination of the trust, the said interest shall be so charged to or collected from the persons who under the terms of said deed shall be entitled to that share of the income now payable to him.

That upon the termination of the trusts such of said three sums of Ten Thousand Dollars each as shall have been paid to my said three Grand-children shall be brought into the principal of said estate and in the division thereof charged against the shares of said grand-children respectively. If any of them who shall have received said sum of Ten Thousand Dollars be at that time deceased, then the sum so paid him shall be charged against the persons who shall under the terms of said deed be entitled to the share of the principal which would have been payable to such grand-child if then living.

Witness my Hand and Seal this 17th day of January, nineteen hundred and nineteen. Executed in duplicate.

THOMAS COVER. [SEAL.]

Witness:

H. H. M. LEE.

At the date of decedent's death on March 26, 1926, the above trust, as amended and modified, was in full force and effect and the trustee, the Safe Deposit and Trust Company of Baltimore, held as the entire corpus of the trust securities of a total value of \$391,920.78. At that date there had accrued income arising from such securities in the amount of \$5,249.80. The following is the stipulation of facts entered into and filed by the parties:

29

I.

That the Deed of Trust of Thomas Cover to the Safe Deposit and Trust Company of Baltimore dated January 17, 1918, a true copy of which is filed as Exhibit C to the petition herein, was executed on that date by the said Thomas Cover and was not made in contemplation of death, and is not such a Deed of Trust as is embraced within the terms of paragraph (c) of section 302 of the Revenue Act of 1926.

II.

That the Deed of Trust of Thomas Cover to the Safe Deposit and Trust Company of Baltimore dated January 17, 1919, a true copy of which is filed as Exhibit D to the petition herein, was executed on that date by the said Thomas Cover and was not made in contemplation of death, and is not such a Deed of Trust as is embraced within the terms of paragraph (c) of section 302 of the Act of 1926.

III.

Whereas, it appears that there has been allowed as a credit against the tax claimed by the United States the sum of \$51,352.69 on account of state inheritance taxes paid by said estate to the state of Virginia, such taxes having been imposed upon property other than that constituting the corpus of the said trust; and

Whereas, under the law of the state of Virginia, the state inheritance tax is fixed at a sum equal to not less than eighty (80%) per cent of the tax that shall be levied by the United States; and if the action of the Commissioner of Internal Revenue in determining that under and by virtue

of subdivision (d) of section 302 of the Revenue Act of 1926 there should be included as part of the taxable estate of the said Thomas Cover, deceased, the stocks, bonds and other securities of the value of \$391,920.78, being the corpus of the trust estate created by the said Deed of Trust executed January 17, 1918, by said Thomas Cover, to the Safe Deposit and Trust Company of Baltimore, together with certain accrued interest thereon, amounting to the sum of \$5,249.80, is upheld, and a tax in the nature of a deficiency over and beyond that returned and paid by the said estate is determined, the state of Virginia will claim, and the said estate of Thomas Cover will have to pay, an additional inheritance tax to Virginia in a sum equal to eighty (80%) per cent of the deficiency determined;

It is agreed by and between the parties hereto that in that event, against any such additional tax imposed by the United States the said estate of Thomas Cover, deceased, shall be entitled to have credited the amount, not in excess of eighty (80%) per cent of the United States deficiency tax, of any additional estate, legacy, inheritance or succession tax imposed on any of the property so included by the United States in the gross estate of said Thomas Cover, deceased, actually paid to the state of Virginia; Provided, that the same shall have been paid and credit therefor claimed within three years after December 9, 1926, the date the return of the Executors of the estate of Thomas Cover, deceased, was filed with the Collector of Internal Revenue for the District of Virginia.

Opinion.

LANSDON: The parties have stipulated that the declarations of trust were not made in contemplation of death and that they were not such transfers as are embraced within the terms of section 302(c) of the Revenue Act of 1926, which section deals with transfers made in contemplation of death and with those intended to take effect in possession or enjoyment at or after death.

The petitioners contend that the transfers herein involved were not intended to take effect in possession or enjoyment at or after death; that they were not transfers the enjoyment of which was subject to any change at the date of de-

cedent's death through the exercise of a power to alter, amend or revoke, within the meaning of section 302(d) of the Revenue Act of 1926; and that section 302 is unconstitutional in so far as it includes as a part of the gross estate property transferred prior to the enactment of the Revenue Act of 1926.

31 Section 302 of the Revenue Act of 1926 provides, so far as material in the instant proceeding, as follows:

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishments of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

In the declaration of trust dated January 17, 1918, Cover reserved to himself "the right * * * to alter, change or modify the trust hereby created without the right to withdraw any part of the principal". Any such change was

to be "evidenced by a paper writing under my hand and seal and lodged with said Trustee during my life-time." This, petitioners argue, was such a restricted reservation of power as to leave none of the economic benefits in the settlor and that the reservation was for the benefit of that class in whose interest the trust was created, namely, his children and descendants, rather than for the benefit of the settlor. We see nothing in the trust deed to warrant such a conclusion. As we read that instrument, the settlor held complete control over the distribution of the trust property up to the moment of his death, except that he could not withdraw the principal. He could have directed
32 that one beneficiary be substituted for another; that the trust property be distributed among new beneficiaries; that the income be paid to himself; or that it should accumulate. These are by no means the least substantial of the legal incidents of ownership. The Supreme Court has held, in *Chase National Bank et al., v. United States*, 278 U. S. 327, that "the freeing of the remainder of the possibility of the exercise of that power" was sufficient to subject property to a tax.

In his brief, counsel for the petitioners stressed the point that the beneficiaries of the trust took vested rights subject only to being divested to the extent that the power to amend, alter or modify reserved in the settlor might be exercised and that such a reservation of power does not prevent the vesting of an estate. This argument is completely answered by the Supreme Court in *Chase National Bank et al. v. United States, supra*. In that case the decedent had taken out life insurance payable to his wife, reserving to himself the right to change the beneficiary. The face value of the policies was held to be subject to the estate tax. It was urged in that case that the wife's right vested prior to her husband's death. The court held that even if that were true, it would not be material and upon the question of vesting said, quoting from *Saltonstall v. Saltonstall*, 276 U. S. 260:

So long as the privilege of succession has not been fully exercised it may be reached by the tax. See *Cahen v. Brewster*, 203 U. S. 543; *Orr v. Gilman*, 183 U. S. 278; *Chanler v. Kelsey, supra*; *Moffitt v. Kelly, supra*, *Nickel v. Cole, supra*. And in determining whether it has been so exer-

cised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor

33 leaves the transfer, as to him, incomplete and subject to tax. *Bullen v. Wisconsin*, 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another.

In the instant proceeding the decedent had many substantial rights with respect to the trust property, which ceased only at his death. It is this cessation of rights of the decedent which is the subject of the estate tax. *Chase National Bank, et al. v. United States*, *supra*; *Edwards v. Slocum*, 264 U. S. 61; *Y. M. C. A. v. Davis*, 264 U. S. 47; *N. Y. Trust Co. v. Eisner*, 256 U. S. 345. In the *Chase National Bank* case, *supra*, the Supreme Court stated:

Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler v. Kelsey*, 205 U. S. 466. "To make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." *Sugden, Powers* (8th Ed.) 396; see *Gray, Perpetuities* (3d Ed. 1915) Sec. 526(c). And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen v. Wisconsin*, 240 U. S. 625; cf. *United States v. Robbins*, 269 U. S. 315, 327; *Cohen v. Samuels*, *supra*.

It is argued that the *Chase National Bank* case does not apply here, since Cover could not have withdrawn the corpus of the trust. That fact seems immaterial, however, since he had complete control over the benefits to be bestowed upon the beneficiaries. In the *Chase National Bank* case the insured could have recovered during his life only

the cash surrender value of the policy and yet the Supreme Court held that the face value of the policy was properly included in computing his gross estate at death.

In the recent Supreme Court case of *Reinecke v. Northern Trust Co.*, 278 U. S. 339, there were seven trusts in-
34 involved, two of which contained a reservation of the right to revoke absolutely; the remaining five reserving the power to alter, change or modify with the consent of the beneficiaries. The Court there stated, referring to the five trusts:

If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts still it was not one vested in the settlor alone, as were the reserved powers of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial and consequently the adverse, interest, the trust for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

In the instant case power to alter, change or modify was reserved to decedent alone. He had absolute control of the beneficial interest. We think the transfers herein involved are more like the two trusts in the *Reinecke* case which the Supreme Court held were subject to the estate tax.

Subsection (h) of the Revenue Act of 1926 expressly makes section 302 retroactive. A similar section in the 1918 Act was held to be unconstitutional by the Supreme Court in *Nichols v. Coolidge*, 274 U. S. 531, since it attempted to include in the gross estate property transferred prior to the enactment of the statute. The constitutionality of section 402 of the Revenue Act of 1921, which corresponds to section 302 of the Revenue Act of 1926, was upheld by the Supreme Court in *Reinecke v. Northern Trust Co.*, and *Chase National Bank v. United States*, *supra*, where a transfer was made before the enactment of the statute,

but which was subject to a power of revocation in the transferor terminable at his death. The court stated in the *Reinecke* case:

35 As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of *Nichols v. Coolidge*, 274 U. S. 531. In that case it was held that the provisions of the similar Sec. 402 of the 1918 Act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void as respects transfers completed before any such statute was enacted. But in No. 77, *Chase National Bank v. United States*, — U. S. —, decided this day, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall v. Saltonstall*, 276 U. S. 260, 271, that a transfer made before the enactment of the statute now in question and subject to a power of revocation in the transferor, terminable at his death, is not complete until his death and hence Sec. 402, as applied to it, is not retroactive where his death follows the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank v. United States*, *supra*, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed.

It follows that the value of the property constituting the corpus of the trusts, plus the undistributed income which had accrued at the date of decedent's death, should be included in computing the gross estate of decedent for estate tax purposes. See *McCaughn v. Fidelity Trust Co.*, 34 Fed. (2d) 443.

Pursuant to the stipulation of the parties, the deficiency herein determined should be credited with inheritance taxes paid to the State of Virginia.

Reviewed by the Board.

Decision will be entered under Rule 50.

Now, February 26, 1930, the foregoing Findings of Fact and Opinion certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

36 United States Board of Tax Appeals, Washington.

Docket No. 34842.

LORING A. COVER, JOHN M. STECK and HARRY R. KERN,
Executor of the Estate of Thomas Cover, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Pursuant to the findings of fact and opinion of the Board promulgated October 31, 1929, the respondent in the above-entitled proceeding filed a computation of the proposed tax liability on December 9, 1929. Due notice having been given to the parties, the proceeding was called for hearing from the Day Calendar January 8, 1930. No objection having been made to the computation submitted, it is

Ordered and decided that there is a deficiency in estate tax of \$6,671.02.

Enter.

W. C. LANASDON,
Member.

Entered Jan. 10, 1930.

A true copy. Teste:

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Now, February 26, 1930, the foregoing Decision certified from the record as a true copy.

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

37

Copy.

Sherley, Faust & Wilson.

Filed Feb. 12, 1930.

In the Court of Appeals of the District of Columbia.

No. —.

LORING A. COVER, JOHN M. STECK, and HARRY R. KERN,
Executors of the Estate of Thomas Cover, Deceased,
Petitioners,

v.

ROBERT H. LUCAS, Commissioner of Internal Revenue,
Respondent.

*Petition for Review of Decision of the United States Board
of Tax Appeals.*

To the Honorable the Chief Justice and Associate Justices
of the Court of Appeals of the District of Columbia.

Your petitioners, Loring A. Cover, John M. Steck and Harry R. Kern, executors of the estate of Thomas Cover, deceased, are aggrieved by a decision of the United States Board of Tax Appeals rendered against them on January 8, 1930, in the case of Loring A. Cover et al., executors of the estate of Thomas Cover, deceased v. Commissioner of Internal Revenue, No. 34842 on the docket of the Board, and respectfully submit their petition for a review thereof by the Court of Appeals of the District of Columbia, the parties having agreed that the review shall be in this Court, as evidenced by stipulation filed with the Clerk of the Board. Jurisdiction of this Court is invoked under sections 1001 and 1002 of the Revenue Act of 1926.

38

Statement of the Case.

1. Petitioners state that decedent, Thomas Cover, departed this life testate on March 26, 1926, and was at and before the time of his death a citizen of the State of Vir-

ginia and a resident of the City of Winchester in said State.

2. That in and by the terms of his last will and testament duly admitted to probate in the Corporation Court of the City of Winchester, State of Virginia, petitioners Loring A. Cover, John M. Steck and Harry R. Kern were named as executors of the estate of said decedent. That petitioners accepted the trust imposed upon them by said last will and testament of said Thomas Cover, deceased, and on April 19, 1926, were duly qualified as executors of the estate of Thomas Cover, deceased, in and by the Corporation Court of the City of Winchester, Virginia, aforesaid, and are now and ever since their qualification aforesaid have been such executors.

3. Petitioners state that on January 17, 1918, Thomas Cover executed and the Safe Deposit & Trust Company of Baltimore accepted a certain Deed of Trust whereby said Cover placed in trust with said Trust Company for the benefit of his children then living and the children of his deceased children certain stocks, bonds and other securities enumerated in a schedule thereto attached, and by supplemental deed dated January 8, 1919, added further property thereto.

4. That by the terms of said Deed of Trust of January 17, 1918, the settlor, said Thomas Cover, reserved the right to
39 alter, amend or modify the trust thereby created,
without the right to withdraw any part of the principal, any such change, alteration or modification to be evidenced by a paper writing under his hand and seal and lodged with said trustee during the settlor's life.

5. That subsequently on January 19, 1919, settlor, said Thomas Cover, by Deed of Alteration authorized the trustee, said Safe Deposit and Trust Company of Baltimore, to make certain payments from the principal of said trust to certain of settlor's grandchildren upon their request, the grandchildren receiving said sums to be charged interest thereon, and upon the termination of the trust originally created such advances to be charged against the share of said grandchildren if living, or if deceased against the persons who shall be entitled to the share of the principal which would have been payable to such grandchild if then living, all of which more particularly appears in said Deed of Alteration.

6. Petitioners state that at the time of the death of said Thomas Cover, to-wit March 26, 1926, said trust was in full force and effect and the trustee, the said Safe Deposit and Trust Company, held as the entire corpus of said trust certain named securities which have been determined by the Commissioner of Internal Revenue as having a value at said date of the sum of \$391,920.78, and accrued income arising thereon in the sum of \$5,249.80.

7. Petitioners state that in their return as executors aforesaid of the gross estate of decedent subject to the federal estate tax, they excluded the corpus of said trust fund and accrued interest thereon and paid an estate tax determined upon the basis of the gross estate so reported.

40 8. That subsequently on December 12, 1927, by deficiency letter of that date, the respondent proposed an additional estate tax against petitioners, as executors aforesaid, in the amount of \$33,355.07. That said proposed tax was based upon an increase in the gross estate of decedent by the sum of \$397,170.58 being the value of the corpus of said trust estate, plus the said accrued interest thereon, which corpus and interest respondent claimed should be treated as a part of the estate of decedent under and by virtue of subdivision (d) of section 302 of the Revenue Act of 1926.

9. On February 9, 1928, petitioners appealed to the United States Board of Tax Appeals from the determination of respondent aforesaid and thereafter, upon issue joined, and upon a stipulation of facts, the appeal was submitted and on the 31st day of October, 1929, said Board rendered a decision affirming said determination of the Commissioner.

10. That under the stipulation between the parties aforesaid it was agreed, inasmuch as under the law of the State of Virginia the state inheritance tax is fixed at a sum equal to not less than eighty per cent of the tax that shall be levied by the United States, that if the action of respondent in determining that under and by virtue of subdivision (d) of section 302 of the Revenue Act of 1926 there should be included as part of the taxable estate of said Thomas Cover, deceased, the stocks, bonds and other securities comprising the corpus of said trust estate, together with the accrued interest thereon, was upheld and a tax in the nature of a

deficiency over and beyond that returned and paid by the said estate was determined, and the State of Virginia
41 should claim and the said estate of Thomas Cover should pay an additional inheritance tax to Virginia in a sum equal to eighty per cent of the deficiency determined. the petitioners would be entitled to have credited the amount, not in excess of eighty per cent of the United States deficiency tax, of any additional estate, legacy, inheritance or succession tax imposed by the State of Virginia on any of the property so included by the United States in the gross estate of said Thomas Cover, deceased; provided that the same shall have been paid and credit therefor claimed within three years after December 9, 1926, the date of the return of the executors of the estate of Thomas Cover, deceased, was filed with the Collector of Internal Revenue for the district of Virginia.

11. That thereafter, and subsequent to said decision by the Board of Tax Appeals, the State of Virginia demanded and the executors paid said State on account of said trust property inheritance taxes in the sum of \$26,684.05, being an amount equal to eighty per cent of the federal estate tax assessed against said estate on account of said property, and thereafter, to-wit on the 10th day of January, 1930, the Board of Tax Appeals allowed a credit in the amount of said estate and inheritance taxes paid to the Commonwealth of Virginia on November 29, 1929, to-wit. the sum of \$26,684.05, and determined as an undischarged deficiency in federal estate tax against the estate of said decedent the sum of \$6,671.02, and from such determination aforesaid this appeal is prayed.

12. Petitioners state that by virtue of said Deeds of Trust aforesaid the title to said property and the income
42 resulting therefrom passed irrevocably from the said Thomas Cover to the Safe Deposit and Trust Company of Baltimore in trust, to hold the corpus of said trust estate, collect the income and distribute the same among the living children of the settlor and the descendants of those dead per stirpes, and subsequently, upon the death of all the children of the settlor and the coming of the age of 21 of the youngest grandchild living at the death of the settlor said trust ceases and the principal of the trust estate is to be divided among all of settlor's descendants then living, per stirpes.

13. Petitioners state that said securities and the accrued income aforesaid were and are no part of the estate of said decedent, Thomas Cover, and the transfer of title to same by said Deeds of Trust does not constitute such a transfer as is embraced within the provisions of subdivision (*d*) of section 302 of the Revenue Act of 1926 or of any other provision of said law, and is not taxable as a part of the estate of said decedent.

14. Petitioners further state that said Deeds of Trust were made and the transfers of property embraced therein effected long prior to the passage of either the Revenue Act of 1924 or the Revenue Act of 1926, to-wit on January 17, 1918, and January 8, 1919, and at the time made were lawful transfers of title not made in contemplation of death and subject to no tax by any law of the United States.

15. That if subdivision (*c*) or subdivision (*d*) of section 302 of the Revenue Act of 1926 or any other provision of said Act be so construed as to embrace within its terms said transfers and to impose upon the estate of said decedent, Thomas Cover, a tax because of such transfers, such provision is arbitrary, invalid and unconstitutional and contrary to the due process clause of the
43 Fifth Amendment to the Constitution of the United States.

Assignments of Error.

Your petitioners believe and aver that error was committed by the Board, to their damage and prejudice, as follows: The Board erred

(1) In holding and deciding that the corpus of said trust estate and the interest that had accrued thereon at the time of the death of the decedent, Thomas Cover, was and is part of the estate of said Thomas Cover, deceased, and that under and by virtue of subdivision (*d*) of section 302 of the Revenue Act of 1926 the same should be included as part of the taxable estate of the said Thomas Cover, deceased.

(2) In determining that there was due as a deficiency in estate tax by the estate of Thomas Cover, deceased, the sum of \$33,355.07, and that there was due to the United States as an undischarged deficiency in said tax the sum of \$6,671.02.

(3) In not holding that the corpus of said trust and accrued interest thereon were not a part of the estate of decedent, Thomas Cover, and that there was no deficiency in estate tax due from said estate to the United States.

Wherefore your petitioners pray that the decision of the Board of Tax Appeals entered herein against them be reviewed and reversed by this Honorable Court, and
44 for such other and further relief as the Court may deem meet and proper in the premises.

LORING A. COVER,
JOHN M. STECK,
HARRY R. KERN,

*Executors of the Estate of Thomas
Cover, Deceased, Petitioners,*

By SWAGAR SHERLEY,
FREDERICK DE C. FAUST,
CHARLES F. WILSON.

*Attorneys for Petitioners, Metropolitan
Bank Building, Washington, D. C.*

CITY OF WASHINGTON.

District of Columbia, ss:

Swagar Sherley, being duly sworn, deposes and says that he is one of the attorneys for the petitioners. That he knows the contents of the foregoing petition; that to the best of his knowledge and belief the statements therein are true, and that the assignments of error are well taken and intended to be argued.

SWAGAR SHERLEY.

Subscribed and sworn to before me this 12 day of —, 1930.

[Seal of Josephine L. Hayes, Notary Public, District of Columbia.]

JOSEPHINE L. HAYES,
Notary Public, D. C.

45 General Counsel, Bureau of Internal Revenue,
18th Street and New York Avenue,
Washington, D. C.

DEAR SIR:

You are hereby notified that on February 12th, 1930, a petition for a review of the decision of the United States

Board of Tax Appeals was filed with the Clerk of the Board in the case of Loring A. Cover, John M. Steck and Harry R. Kern, Executors of the Estate of Thomas Cover, deceased v. Robert H. Lucas, Commissioner of Internal Revenue, Docket No. 34842, a true copy of which petition is herewith served upon you.

SWAGAR SHERLEY,
FREDERICK DE C. FAUST,
CHARLES F. WILSON,
*Attorneys for Petitioners, Metropolitan
Bank Building, Washington, D. C.*

Receipt of the foregoing notice and copy of petition is acknowledged this 12th day of February, 1930.

C. M. CHAREST,
*General Counsel, Bureau of Internal
Revenue, Attorney for Commis-
sioner of Internal Revenue.*

Now, February 26, 1930, the foregoing Petition for Review with Proof of Service thereon certified from the record as a true copy.

[Seal of the U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

46

Copy.

Filed Feb. 12, 1930.

United States Board of Tax Appeals.

Docket No. 34842.

LORING A. COVER, JOHN M. STECK, and HARRY R. KERN, Executors of the Estate of Thomas Cover, Deceased. Petitioners,

v.

ROBERT H. LUCAS, Commissioner of Internal Revenue, Respondent.

Stipulation.

It is hereby stipulated and agreed this 12th day of February, 1930, by and between the parties hereto, by their re-

spective attorneys of record, that the decision of the Board of Tax Appeals in the above entitled cause may be reviewed by the Court of Appeals of the District of Columbia.

This agreement is filed pursuant to Section 1002 (*d*) of the Revenue Act of 1926.

SWAGAR SHERLEY,
FREDERICK DE C. FAUST,
CHARLES F. WILSON.

Attorneys for Petitioners.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

Now, February 26, 1930, the foregoing Stipulation under Sec. 1002 (*d*) certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

47

Copy.

Filed Feb. 1, 1930.

United States Board of Tax Appeals.

No. 34842.

LORING A. COVER, JOHN M. STECK, and HARRY R. KERN, Executors of the Estate of Thomas Cover, Deceased. Petitioners,

v.

ROBERT H. LUCAS, Commissioner of Internal Revenue, Respondent.

Præcipe.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and within sixty days from the date of the filing of the petition for review and notice thereof in the above stated case transmit to the Clerk of the Court of Appeals of the District of Columbia certified copies of the following documents:

1. The docket entries or proceedings before the United States Board of Tax Appeals in the case above entitled.
2. Pleadings, exhibits, etc., before said Board.
3. Findings of fact, opinion and decision of said Board.
4. Petition for review.
5. Stipulations of fact, etc.
6. Stipulation under section 1002 (d) of the Revenue Act of 1926.

48 The foregoing to be prepared, certified and transmitted as required by law and the rules of the Court of Appeals of the District of Columbia.

Dated this 12th day of February, 1930.

SWAGAR SHERLEY,
FREDERICK DE C. FAUST,
CHARLES F. WILSON,

*Attorneys for Petitioners,
Metropolitan Bank Building, Washington, D. C.*

Service of a copy of the foregoing præcipe is hereby acknowledged this 12th day of February 1930.

(S.)

C. M. CHAREST,
G. C., Bureau of Int. Rev.

Now, February 26, 1930, the foregoing Præcipe certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 5157. Loring A. Cover, John M. Steck, and Harry R. Kern, executors of the estate of Thomas Cover, deceased, appellants, vs. Robert H. Lucas, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Feb. 28, 1930. Henry W. Hodges, Clerk.

OCT 13 1931

Henry W. Hodges
Court of Appeals, District of Columbia

No. 5157

LORING A. COVER, JOHN M. STECK and HARRY R. KERN,
Executors of the Estate of Thomas Cover, Deceased,
Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellee

ADDITIONAL AUTHORITIES

SWAGAR SHERLEY
FREDERICK DEC. FAUST
CHARLES F. WILSON
Attorneys for Appellants

Court of Appeals, District of Columbia

LORING A. COVER, JOHN M. STECK and HARRY R. KERN,
Executors of the Estate of Thomas Cover, Deceased,
Appellants

No.

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellee

ADDITIONAL AUTHORITIES

Pursuant to leave granted during oral argument, appellants submit the following additional authorities in support of their position:

Brady v. Ham, 45 F (2d) 454 (455, 456, 457).

Commissioner of Internal Revenue v. Northern Trust Company, 41 F. (2d) 732; affirmed 283 U. S. 782.

Crooks v. Loose, 36 F. (2d) 571 (573).

Leser v. Burnet, 46 F. (2d) 456 (458, 459, 460).

McCaughn v. Carnill, 43 F. (2d) 69. Certiorari denied 283 U. S. 825.

McCormick, *et al.*, v. Commissioner of Internal Revenue, 283 U. S. 784; reversing 43 F. (2d) 277.

Morsman v. Commissioner of Internal Revenue, 283 U. S. 783; reversing 44 F. (2d) 902.

White v. Erskine, 47 F. (2d) 1014 (1016).

Report No. 770, Committee on Ways and Means, House of Representatives, 68th Congress, page 65.

STATUTES

Public—No. 131—71st Congress—H. J. Res. 529.
(C. C. H. Federal Tax Service 1931, Vol. II, page 5292.)

Respectfully submitted,

SWAGAR SHERLEY

FREDERICK DEC. FAUST

CHARLES F. WILSON

Attorneys for Appellants

October 13, 1931.

NOV 1 - 1930

Court of Appeals, District of Columbia
CLERK.

JANUARY TERM, 1930

No. 5157

LORING A. COVER, JOHN M. STECK, and HARRY R. KERN,
Executors of the Estate of Thomas Cover, Deceased,
Appellants

v.

DAVID BURNET, Commissioner of Internal Revenue
Appellee

APPEAL FROM THE UNITED STATES BOARD OF
TAX APPEALS

BRIEF FOR APPELLANT

SWAGAR SHERLEY
FREDERICK DEC. FAUST
CHARLES F. WILSON
Attorneys for Appellants

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Court of Appeals, District of Columbia

LORING A. COVER, JOHN M. STECK, and
HARRY R. KERN, Executors of the Es-
tate of Thomas Cover, deceased,

Appellants

v.

No. 5157

DAVID BURNET, Commissioner of Inter-
nal Revenue.

Appellee

BRIEF FOR APPELLANT

STATEMENT

This is an appeal from a decision of the United States Board of Tax Appeals sustaining a deficiency assessment of \$33,355.07 in estate taxes against the estate of Thomas Cover, deceased.

The deficiency was sustained under and by virtue of subdivision (d) of Section 302 of the Revenue Act of 1926 and was determined by including as part of the gross taxable estate of Thomas Cover, deceased, certain stocks, bonds and other securities of a value of \$397,170.58, being the corpus of a trust with income accrued thereon, created by the said Thomas Cover for the benefit of his children and grandchildren by Deed of Trust

executed January 17, 1918, supplemented by a further Deed dated January 8, 1919, whereby additional property was added to such trust estate.

JURISDICTION

This case is brought to this Court by petition for review filed February 12, 1930 (R. pp. 31-35), pursuant to Sections 1001 and 1002 of the Revenue Act of 1926, 44 Stat. 9, 109, 110, and a stipulation of the parties under Section 1002 (d) of that Act. (R. 37)

There is no dispute as to the facts, the issues presented being solely questions of law.

THE FACTS

Thomas Cover, a citizen of the State of Virginia, died testate on March 26, 1926. The Appellants, Loring A. Cover, John M. Steck and Harry R. Kern, were named and qualified as executors of his estate, and are now and ever since their qualification have been such executors.

On January 17, 1918, or more than eight years before his death, Thomas Cover executed a Deed of Trust (R 11-13) whereby he conveyed to the Safe Deposit and Trust Company of Baltimore as Trustee, for the benefit of his children then living and the children of his children then dead, certain enumerated securities, and by a supplemental deed dated January 8, 1919, added further property thereto. Under the terms of the deed the trust was to continue until the death of all of decedent's children and until his youngest grandchild living at his death should reach the age of twenty-one years.

By the terms of the deed of January 17, 1918, Cover reserved the right during his life to alter, change or

modify the trusts thereby created without, however, the right to withdraw any part of the principal, any such alteration, change or modification to be evidenced by a paper writing under his hand and seal and lodged with the trustee during decedent's life.

Thereafter, on January 17, 1919, Cover, by deed of alteration (R 13-14), authorized the trustee at any time after January 1, 1925, to make certain payments of the principal of the trust to certain named grandchildren of decedent upon their request, the grandchildren receiving such payments to be charged interest thereon and upon termination of the trust to have such payments charged against their respective shares of the principal of the trust.

The trust was not modified in any other particular by Cover during his lifetime and at the date of his death the trustee held as the entire corpus of the trust the various securities which were determined by the appellee as having a value on that date to-wit, March 26, 1926, of the sum of \$391,920.78, and income accrued thereon in the sum of \$5,249.80.

The appellants, in making their return as executors of the estate, excluded from the gross estate of decedent the corpus of the trust and the accrued income thereon and paid an estate tax to the United States determined upon the basis of the gross estate so reported.

Thereafter, on December 12, 1927, the appellee, by a deficiency letter of that date, proposed an additional tax against appellants as executors aforesaid in the sum of \$33,355.37. Such proposed tax was based upon an increase in the gross estate of decedent by the sum of

\$397,170.58, being the value of the corpus of the trust estate, plus the accrued interest thereon, which corpus and accrued interest appellee claimed should be treated as part of the estate of decedent under and by virtue of subdivision (d) of Section 302 of the Revenue Act of 1926.

The appellants thereupon, on February 9, 1928, appealed to the United States Board of Tax Appeals from the determination of appellee and thereafter, upon a stipulation of facts, the appeal was submitted and on October 31, 1929, the Board rendered a decision affirming such determination of the appellee. (R. 16, 17, 18)

Thereafter, the State of Virginia, under the law of that state whereby the state inheritance tax is fixed at a sum equal to not less than eighty per cent of the tax that shall be levied by the United States, demanded and appellants as executors aforesaid thereupon paid to that state on November 29, 1929, inheritance taxes in the sum of \$26,684.05, being an amount equal to eighty per cent of the federal estate tax theretofore assessed against the Cover estate on account of the corpus of said trust and thereafter the Board of Tax Appeals, on January 10, 1930, allowed credit in the amount of such inheritance taxes so paid to the State of Virginia, namely, \$26,684.05, and determined as an undischarged deficiency in federal estate tax against decedent's estate the sum of \$6,671.02, from which determination this appeal was taken.

THE TRUST DEEDS

The Deed of Trust of Thomas Cover to the Safe Deposit and Trust Company of Baltimore dated January 17, 1918, is as follows: (R. 11-12)

"KNOW ALL MEN BY THESE PRESENTS:

"That I THOMAS COVER, of Winchester, Virginia, do, out of the love and affection which I bear to my children and descendants and for the purpose of providing an income for them, hereby give, grant and assign unto the SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, a body corporate of the State of Maryland, the securities enumerated on the Schedule hereto attached and made part hereof, to be held by it for the following uses and trust purposes, that is to say:

"To collect the income therefrom and after paying thereout all taxes and charges, including a commission to the Trustee for all services under this deed of five per cent (5%) on the amount of income collected, to pay the remainder of such income on December 1st, 1918, and every six months thereafter to my children and the descendants of my deceased children living from time to time as said income is payable, such payments to be per stirpes; provided, however, that any surviving wife or surviving husband of a deceased child of mine shall, during her or his unmarried life, receive on the first days of each June and December succeeding the death of such deceased child of mine one-third of one-eighth of the net income from the Trust Estate, to be deducted from the respective shares of the income of the descendants of such deceased children, if they shall leave descendants, and, if not, then from the income of the Trust Estate. The provision for the wives and husbands of my children herein made shall be operative only if said wives and husbands shall actually have lived upon amicable and harmonious terms with my son or daughter, as the case may be, for at least one year immediately preceding the time of the death of my son or daughter, and the Trustee shall assume they have so lived together unless it shall receive notice to the contrary from me or any one of my children.

"The above Trust shall continue until the death of all my children and until the youngest grandchild of mine living at my death shall reach the age of twenty-one years, when it shall cease and the Trustee shall divide the principal of the Trust Estate among all of my descendants then living, per stirpes.

"If at the termination of the Trust as above provided there shall then be living wives or husbands of any deceased children of mine, the Trustee shall retain out of the shares from which such wives or husbands shall have been receiving the income hereinbefore provided to be paid them, as much of the principal of such share as may be necessary to provide for such payments, and at their respective deaths or remarriages I direct said Trustee to divide the principal thus retained, amongst those entitled to (as above provided) their personal representatives and assigns.

"Power is hereby conferred upon said Trustee to vary the investments of the Trust Estate in such manner as it may deem desirable, except that during my life only with my approval, and for the convenient management of the Trust, it is authorized to have registered in its name in its sole capacity without defining thereon the Trusts, all registered securities.

"All payments hereunder to my children and descendants or other distributees shall be made to them direct, into their own hands and not into the hands of another, whether claiming by their authority or otherwise, provided, however, said Trustee may during the minority of any of my descendants apply their share of the income to their support and education.

"I hereby reserve to myself the right, at any time or times during my life, to alter, change or modify the Trusts hereby created, without the right to withdraw any part of the principal; any such change, alteration or modification by me to be evidenced by a paper writing under

my hand and seal and lodged with said Trustee during my life-time.

"WITNESS my hand and seal this 17th day of January, A. D., nineteen hundred and eighteen. Executed in duplicate.

(Signed) THOMAS COVER (SEAL)

Witness:

RUTH FLETCHER

"SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, hereby acknowledges receipt of the securities named in the schedule annexed, and agrees to hold the same upon the Trusts above declared.

SAFE DEPOSIT AND TRUST CO. OF BALTIMORE

By J. J. HELLIGAN,
President."

The Deed of Alteration of Thomas Cover to said Trust Company dated January 17, 1919, (R. 13-14) is as follows:

"KNOW ALL MEN BY THESE PRESENTS THAT whereas, I, THOMAS COVER, by my deed dated January 17, 1918, granted and assigned to the Safe Deposit and Trust Company of Baltimore, under the trusts therein set forth the property therein mentioned (and by supplement thereto dated January 8, 1919, I added further property thereto) which deed provides that the trust should continue until after the death of all of my children and until the youngest grand-child of mine surviving at my death should reach the age of 21 years and should then terminate, and under which deed I reserved to myself the right at any time or times during my life to alter, change or modify the trusts thereby created, without the right to withdraw any part of the principal, any such change, alteration or modification to be evidenced by a paper writ-

ing under my hand and seal and lodged with said Trustee during my life.

"NOW, THEREFORE, in pursuance of the power of alteration so reserved by me, I do hereby direct that the said Safe Deposit and Trust Company of Baltimore, Trustee, shall at any time after January 1, 1925, pay to each of my grandchildren, Thomas Cover Barton, Lewis N. Barton Jr., and Joseph Marx Barton, Jr., upon his request in writing the sum of Ten Thousand Dollars (\$10,000) out of the principal of said estate, and I confer upon the said Trustee the power to sell such portions of the principal as may be necessary to make such payments.

"And I further direct that after each of said three sums of Ten Thousand Dollars has been paid, the said Trustee shall semi-annually on June 1st and December 1st of each year and until the termination of the trust charge the grand-child receiving said sum, or collect from him, interest at the rate of $4\frac{1}{4}\%$ per annum, the interest so charged or collected to be brought in and distributed with the other income from the trust estate and should such grand-child, so receiving said principal sum of Ten Thousand Dollars, die before the termination of the trust, the said interest shall be so charged to or collected from the persons who under the terms of said deed shall be entitled to that share of the income now payable to him.

"That upon the termination of the trusts such of said three sums of Ten Thousand Dollars each as shall have been paid to my said three grand-children shall be brought into the principal of said estate and in the division thereof charged against the shares of said grand-children respectively. If any of them who shall have received said sum of Ten Thousand Dollars be at that time deceased, then the sum so paid him shall be charged against the persons who shall under the terms of said deed be entitled to the share of the principal which would have been payable to such grand-child if then living.

"WITNESS my Hand and Seal this 17th day of January, nineteen hundred and nineteen. Executed in duplicate.

(Signed) THOMAS COVER (SEAL)

Witness:

H. H. M. LEE

"The SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE acknowledges receipt from Thomas Cover, this 17th day of January, nineteen hundred and nineteen, of the foregoing Deed of Alteration.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE

By JNO. W. MARSHALL

V. P."

STATUTES INVOLVED

"SEC. 301 (a) In lieu of the tax imposed by Title III of the Revenue Act of 1924, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or non-resident of the United States:"

(Then follow the rates.)

"(b) The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304."

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) * * * * *

"(b) * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * "

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

ASSIGNMENTS OF ERROR

The Board of Tax Appeals erred:

(1) In holding and deciding that the corpus of said trust estate and the interest that had accrued thereon at the time of the death of the decedent, Thomas Cover, was and is part of the estate of said Thomas Cover, deceased, and that under and by virtue of subdivision (d) of section 302 of the Revenue Act of 1926, the same should be included as part of the taxable estate of the said Thomas Cover, deceased.

(2) In determining that there was due as a deficiency in estate tax by the estate of Thomas Cover, deceased, the sum of \$33,355.07, and that there was due to the United States as an undischarged deficiency in said tax the sum of \$6,671.02.

(3) In not holding that the corpus of said trust and accrued interest thereon were not a part of the estate of decedent, Thomas Cover, and that there was no deficiency in estate tax due from said estate to the United States.

QUESTIONS OF LAW PRESENTED

1. Was the transfer of interest effected by the trust created by Thomas Cover in 1918 and modified in 1919 one "intended to take effect in possession and enjoyment at or after death," within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. Was such transfer of interest one where the enjoyment thereof was subject at the date of settlor's death to any change through the exercise of a power either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, within the meaning of Section 302 (d) of the Revenue Act of 1926.

3. If either subdivision (c) or (d) of Section 302 be construed to embrace such transfer, is the act, so construed, constitutional.

ARGUMENT

Before undertaking to consider the legal questions that we have stated as here involved, we deem it advisable to consider the character of trust that was created by Thomas Cover. For convenience of reference we have set out in full the trust deed of January 17, 1918, and the Deed of Alteration of a year later. *Supra* pp. 5-8.

The opening sentence of the original Deed of Trust discloses the purpose sought to be accomplished and the consideration therefor. The settlor recites that "*out of the love and affection which I bear to my children and descendants and for the purpose of providing an income for them,*" he conveys the scheduled securities in trust to the Safe Deposit and Trust Company of Baltimore.

The trust is to continue until the death of his children and until his youngest grandchild living at his death shall have reached the age of twenty-one years. The income during the life of the trust is to be paid to his children then living and the descendants of any deceased children per stirpes, with provision for payment of a third of an eighth of such income to any surviving husband or wife of a deceased child while he or she remains unmarried. At the termination of the trust, the corpus is to be divided among the settlor's descendants per stirpes.

Two reservations of control were made by the settlor, to-wit:

1. The trustee might change the investment of the fund, but during the life of Mr. Cover only with the latter's consent.

2. The settlor provides: "*I hereby reserve to myself the right at any time or times during my life to alter, change or modify the trusts hereby created without the right to withdraw any part of the principal; any such change, alteration or modification by me to be evidenced by paper writing under my hand and seal and lodged with said trustee during my lifetime.*"

The original fund was added to on January 8, 1919, and on January 17, 1919, the settlor authorized and directed

the trustee to loan to each of his grandsons Ten Thousand Dollars, on which loans interest was to be charged. No other alteration or modification was made in the trust.

IT IS SUBMITTED THAT THE BENEFICIARIES OF THE TRUST TOOK VESTED RIGHTS SUBJECT ONLY TO BEING DIVESTED TO THE EXTENT THAT THE POWER TO ALTER, CHANGE OR MODIFY RESERVED IN THE SETTLOR MIGHT BE EXERCISED.

That these beneficiaries took vested interests we presume will not be challenged. Certainly under Virginia law, as well as that declared by the Supreme Court of the United States, a power reserved does not prevent the vesting of an estate, nor create a contingent interest, but simply one that may be divested upon the happening of a subsequent event.

In *Lentz v. Massie*, 99 Va. 709, a testator devised property to a daughter, a married woman, for her life and at her death to such of her children as she might in her discretion name as beneficiaries. The Court held that the children took vested rights subjected to be divested in the event the mother exercised the power given her in favor of certain of the children.

In *Jones v. Clifton*, 101 U. S. 225, the Supreme Court held certain conveyances of real estate in Louisville, Kentucky, from a husband to a wife with power of revocation passed a vested interest to the wife and that the property could not be reached by a referee in bankruptcy for the benefit of the husband's creditors.

THE EXTENT OF THE POWER RESERVED BY THE SETTLOR TO ALTER, CHANGE OR MODIFY THE TRUSTS CREATED.

It is the contention of appellants that under the deeds of trust executed by Cover, all beneficial interest in the

corpus of the trust estate passed from him forever; that the reservation of the right to alter, change or modify was for the benefit of the class in whose interest the trust was created, his children and their descendants, and in no sense for the benefit of Cover or his estate.

The Board of Tax Appeals, however, in construing the Deed of Trust, held that Cover had complete control over the distribution of the trust property up to the moment of his death, except that he could not withdraw the principal. In the Board's opinion, it is said:

"He could have directed that one beneficiary be substituted for another, that the trust property be distributed among new beneficiaries, that the income be paid to himself, or that it should accumulate. These are by no means the least substantial of the legal incidents of ownership." (R. 26).

With this conclusion of the Board we take issue.

Such a construction of the power reserved by the settlor is possible only by ignoring the declared purpose of the settlor in creating the trust, and such purpose, as in the case of a will, is the lode star by which a court must be guided in interpreting the language of the trust deed.

The Board declares that it sees nothing in the trust deed to warrant the conclusion that the settlor had parted with all beneficial interest in the trust property.

In answer we submit:

(a) The sole purpose of creating the trust was to make provision for an income for settlor's children and their descendants during the life of the trust.

In the opening sentence of the original trust deed the

settlor declared the purpose of the instrument to be to provide an income for his children and their descendants. The first paragraph declares:

“That I, Thomas Cover of Winchester, Virginia, do, out of the love and affection which I bear to my children and descendants, and for the purpose of providing an income for them, hereby give,” etc.

The settlor, after this recital, then makes detailed provision to that end by providing how the net income shall be paid to his children and their descendants during the life of the trust, and that this primary purpose may not be thwarted the deed contains a spendthrift clause, requiring the payment of the income into the hands of the various distributees, save only that as to minors the trustee is authorized during their minority to use their share of the income for their support and education.

Disregarding this purpose, the Board finds that the settlor's reservation of the right to alter, change or modify, is to be so construed as to reserve to the settlor the right by modification to provide for the payment of the income to himself during the settlor's lifetime. (R. 26)

We submit that such a conclusion is totally unwarranted, for can it be argued that a settlor would create a fund for the express purpose of providing an income for his children, make elaborate detailed provision for the periodic distribution of income to them in person, forbid himself the right to revoke the trust or to withdraw any of the principal, and yet reserve the right to defeat during his lifetime the very end sought, by appropriating for his own use and benefit the income arising from the fund. Such a construction, we believe, would be not only un-

reasonable, but whimsical and capricious in the extreme.

It would be to interpret the words "alter, change or modify" as being synonymous with the word "revoke," for a change whereby the settlor recovered for his own use the income during his lifetime would be *pro tanto* a revocation of the trust which he had made.

(b) The actual exercise of the right to alter, change or modify by the settlor was a modification solely for the benefit of certain of the beneficiaries of the original trust.

In the Deed of Alteration of January 17, 1919, (R. 13-14) Cover provides that at any time after January 1, 1925, upon request of any one of three named grandsons, the trustee shall make such grandson a loan of \$10,000, upon which he shall be charged interest at four and one-half per cent,

"The interest so charged or collected to be brought in and distributed with the other income from the trust estate. And should such grandchild so receiving such principal sum of \$10,000 die before the termination of the trust, the said interest shall be so charged to or collected from the persons *who, under the terms of said trust deeds, shall be entitled to that share of the income now payable to him.*" (R. 14.) (italics ours.)

This requirement clearly shows a continuing purpose on the part of the settlor, "to provide for an income for his children and their descendants," and we repeat that this purpose of the settlor thus again emphasized, must be the rule by which all rights and powers under the trust deed are to be tested and measured.

(c) The reservation in the settlor of the right to alter, change or modify, with the express exclusion of the right

to withdraw the principal, not only limits the powers reserved to the extent of the express denial of a right to revoke the trust by withdrawing the principal, but of necessity limits such alterations, changes or modifications to those intended solely to carry out the primary purpose of the settlor in providing for his children and their descendants.

If the settlor had desired to have the right at any time during his lifetime to so alter, change or modify the trust as to make himself or his estate the beneficiary of such alteration or modification, there would have been no reason or purpose in denying himself, by express provision, the right to revoke the trust. Any change in the trust for the benefit of himself or his estate would, in a true sense, be to that extent a revocation of the trust, and in our judgment, any alteration, change or modification which operated to divest one or all of his children or their descendants for the benefit of a stranger would equally of necessity and to that extent be a revocation.

This trust was made by the settlor eight years prior to his death and there is no evidence of any character in the record, nor has there been the slightest suggestion on the part of the Government or anyone else that Mr. Cover, in making the trust, had in view the avoidance of any estate tax that might otherwise have to be paid by his estate upon his death.

The record discloses that Mr. Cover was a man of large wealth and that the estate passing under his will was many times the value of the corpus of the trust he had created. It must be accepted, therefore, that the wording of the trust deed was not with the thought of keeping during his

life a beneficial interest in the corpus of the trust, and yet placing it in such form as to free the Corpus from any estate tax.

The power reserved by Cover was reserved solely in order that his children and their descendants might have the benefit of his judgment during his life as to how *their interests* might best be safeguarded.

There is not a line in the original Deed of Trust or in the Deed of Alteration that would indicate that Cover reserved to himself any beneficial interest in the corpus of the trust during his lifetime or that he reserved any right by appointment to benefit his estate. He could not by any act of his subject the trust fund to the payment of his debts during his life, nor make it answerable to his creditors after his death.

(d) A careful reading of the trust deeds discloses that the settlor, with apparent care, uses the word "trust" in speaking of the purpose and intent that actuated him in transferring to a trustee the corpus of the trust estate, but in the paragraph reserving in him the right to alter, change or modify, the word used is the plural "trusts"; and again, when in the exercise of such power by Deed of Alteration he makes provision for an advancement of income to certain of his grandsons, reference is made to "trusts," and not to *the trust*.

If any significance is to be drawn from this use of the singular and plural—and it is not to be overlooked that the language of both trust deeds bear evidence of careful and skillful draftsmanship—is it not that the trust as such, whereby he carried out his sole purpose of providing for his children and their descendants, was an irrevocable

act by which the settlor forever parted with any beneficial interest in the corpus of the trust, but that minor matters affecting each trust for each beneficiary might be subject, in the interest of the primary purpose of providing for his descendants, to alteration, change or modification.

In other words, the right reserved to alter, change or modify was intended to apply to the interest of each individual child or descendant and did not relate to the operation of *the trust as a whole*, concerning which the power of withdrawing any part of the principal had been expressly denied the settlor, and, as we believe equally clear, the power to alter, change or modify in any particular the declared purpose of the trust, or to shorten the period of the trust, or to extend its benefits to any beneficiaries other than those within the class named in the trust deed, to-wit, his children or their descendants.

The Court will observe that in the original Deed of Trust, after declaring the settlor's purpose in making it and designating the trustee, detailed provision is made for the distribution of the income among the settlor's children and grandchildren, including the wives and husbands of deceased children. A limitation of time in which the trust is to continue is made and a provision as to the distribution of the corpus at the termination of the trust period.

So far the settlor has spoken of *the trust*, but in the next paragraph, in conferring upon the trustee the power to have registered in its name in its sole capacity the securities comprising the trust estate, the trustee is authorized so to do, "without defining thereon *the trusts*," (R. 12) and in the reservation clause of the deed the settlor

uses the expression, "*the trusts* hereby created." Again, in the Deed of Alteration the settlor refers to *the trusts* created under the original deed and the power reserved to himself to alter, change or modify *the trusts* so created. (R. 13.)

Does not this deed of alteration serve to further emphasize the fact that the corpus of the trust had passed from the settlor absolutely without any right whatever to again repossess any beneficial interest in it, but that details of administration of the trusts for particular beneficiaries were subject to such modification as might lie *within the scope of the original intent* expressed by the settlor when the property was *placed* in trust.

(e) The right to alter, change or modify the trusts must be construed as being limited to the right only to make changes within the class originally named as the beneficiary.

The power reserved by Cover, in our judgment, was not nearly so broad as that which would arise under a general power of appointment, but was similar in its limitation to powers of appointment such as that discussed in the case of *Rhett and Wife v. Mason's Executors, et al.*, 59 Grattan, 541.

In that case the testator had authorized his wife

"during her widowhood by deed or will to dispose of all or any part of my estate to our children, or any of them, at such times and in such proportions as she may think just and prudent."

The Court held, p. 570:

"That the power of appointment given by the testator to his wife during her widowhood by the third

clause of his will is subject only to this limitation, as to the objects in whose favor it may be made; that it must be made in favor of one or more of the children of the testator or of the descendants of any of them who may die before her, and that it extends over the whole of his estate and every part of it."

The avowed purpose of the settlor in the instant case in creating the trusts for the benefit of his children or their descendants, we believe, is as clearly a limitation upon the power of appointment which the settlor had under the reservation of a right to alter, change or modify as that which was contained in the will construed in the case above quoted.

(f) The power reserved by the settlor could only be exercised by deed and could not be exercised by will. It was in no sense testamentary, which would indicate that the settlor did not consider the corpus of the trust estate as forming any part of his estate.

For the foregoing reasons we feel that the conclusion of the Board of Tax Appeals was unwarranted and we submit that the legal effect of the trust created by Cover was

(1) That the beneficiaries of the trust took vested rights subject only to being divested to the extent that power to alter, change or modify reserved in the settlor might be exercised.

(2) All beneficial interest passed out of the settlor forever.

(3) The power of the settlor to alter, change or modify the trust was limited to the right only to make changes among the beneficiaries within the class originally named.

(4) The power could only be exercised by deed and could not be exercised by will.

We come then to consider the legal questions stated.

I

WAS THE TRANSFER OF INTEREST EFFECTED BY THE COVER TRUST ONE INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH WITHIN THE MEANING OF SECTION 302 (C) OF THE REVENUE ACT OF 1926?

It is stipulated that the transfer was not made in contemplation of death. (R. 17.) Was it "intended to take effect in possession or enjoyment at or after death," in the legal meaning of that phrase?

In answering this question, we do so without regard to any question arising from the reservations made by the settlor in the deed of trust, as what we shall have to say under paragraph (d) of Section 302 will equally apply as to paragraph (c), if (c), notwithstanding the express words of (d) dealing with reserved powers, is to be considered as applying to them, as in the absence of a paragraph such as (d) similar language under the Revenue Act of 1921 was so construed.

It will be noted that the appellee in his deficiency letter did not place his ruling on the provisions of paragraph (c) and the General Counsel of the appellee in the stipulation entered into agreed that it was not applicable. (R.17.) This stipulation we do not doubt was meant to be simply on the basis that assuming a completed gift the possession and enjoyment was not one "intended to take effect at or after death," within the contemplation of the statute.

Without undertaking to stress the stipulation entered into by the Government other than as expressly excluding any question of the transfer being made *in contemplation*

of death, we submit that the decision in *Reinecke v. Trust Company*, 278 U. S. 347, settles once and for all the matter. The Court in that case, construing identical language of the 1921 Act, says:

“But the question much pressed upon us remains, whether, the donor having parted both with the possession and *his entire beneficial interest* in the property when the trust was created, *the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment of the statute, is included within its taxing provision.* (Italics our.) That question, not necessarily involved, was left unanswered in *Shukert v. Allen*, 273 U. S. 545. There the gift of a remainder interest, having been made without reference to the donor's death, although it did in fact vest in possession and enjoyment after his death, was held not to be a transfer intended to take effect in possession or enjoyment at or after the donor's death, and for that reason not to be subject to the tax. But here the gift was intended to so take effect, although the transfer which effected it preceded the death of the settlor and was itself not subject to the tax unless made so by the circumstances that the possession or enjoyment passed as indicated.

“In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y. M. C. A. v. Davis*, 264 U. S. 47, 50; *Edwards v. Slocum*, 264 U. S. 61, 62; *N. Y. Trust Co. v. Eisner*, 256 U. S. 345, 349. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give

his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

"It is of significance, although not conclusive, that the only section imposing the tax, Section 401, does so on the net estate of decedents, and that the miscellaneous items of property required by Section 402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of control, possession or enjoyment of the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute and the language of Section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in Section 402 (c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the pos-

session, enjoyment or control of the donor at his death and so taxable as transfers at death under Section 401. That doubt must be resolved in favor of the taxpayer. *Gould v. Gould*, 245 U. S. 151, 153; *United States v. Merriam*, 263 U. S. 179, 187. Doubts of the constitutionality of the statute, if construed as contended by the government, would require us to adopt the construction, at least reasonably possible here, which would uphold the act."

See also *May v. Heiner*, 281 U. S. 238.

The fact that the Cover trust, like each of the five trusts in the Reinecke case, was one under which the corpus could not be distributed until after the death of the settlor, does not serve to bring it within the provisions of paragraph (c) of Section 302 of the 1926 law. The two laws in this regard are identical.

II

WAS SUCH TRANSFER OF INTEREST HERE INVOLVED ONE WHERE "THE ENJOYMENT THEREOF WAS SUBJECT AT THE DATE OF SETTLOR'S DEATH TO ANY CHANGE THROUGH THE EXERCISE OF A POWER EITHER BY THE SETTLOR ALONE OR IN CONJUNCTION WITH ANY PERSON, TO ALTER, ~~CHANGE~~, OR REVOKE," */am*
WITHIN THE MEANING OF SECTION 302 (D) OF THE REVENUE ACT OF 1926?

In construing the language of paragraph (d) of Section 302, there must be borne in mind the character of tax that is being imposed.

"The statute in terms taxes transfers. Like provisions in earlier acts have been generally upheld as imposing a tax on the privilege of transferring the property of a decedent at death measured by the value of the interest transferred or which ceases at death."

This statement, taken from the very recent case of *Chase Nat'l Bank v. United States*, 278 U. S. 334, while there applied to the estate tax law of 1921 is equally applicable to the Revenue Law of 1926, the one here in question.

The law as an excise tax is one on the privilege of transfer of an interest of a decedent at death or of an interest of a decedent which ceases at death. In either case it is a *beneficial interest* of the decedent that is transferred or ceases. This is made plain in the two cases decided on January 2, 1929, and to which reference has been made—the Chase Nat'l Bank case and the Reinecke case.

Those cases dispose of the contention that because a transfer not testamentary in character has resulted in giving the transferee a vested and not a contingent interest, there can be nothing upon which an estate tax can rest by pointing out that the test is not the character of title a beneficiary takes, but the *absoluteness and completeness* of the transfer by the decedent of *all his beneficial interest*. But they clearly indicate also that it is either the privilege of a transfer from the decedent at death to a beneficiary or of a *transfer made absolute by the termination at death of a power in the decedent to recover from a beneficiary an interest theretofore transferred*, that the excise must rest on.

An examination of these cases will, we think, justify the statement just made.

In the Chase National Bank case, the Court held as part of the gross estate of the decedent, under Sections 401 and 402 (f) of the 1921 law, the proceeds of certain insurance policies on the decedent's life, payable to named

beneficiaries, but where, by the terms of the policies, the decedent had a complete right during his life to surrender and cancel the policies for their cash surrender value to pledge them, to change the named beneficiaries, or if desired to make his estate the beneficiary. The Court said:

“It is true, as emphasized by plaintiffs, that the interest of the beneficiaries in the insurance policies effected by decedent ‘vested’ in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.

“A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors, *Cohen v. Samuels*, 245 U. S. 50 (see *Burlingham v. Crouse*, 228 U. S. 459), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, *N. Y. Domestic Relations Law* c. 14, Consol. Laws section 52; *Kittel v. Domeyer*, 175 N. Y. 205; *Guardian Trust Co. v. Straus*, 139 App. Div. 884, *aff’d* 201 N. Y. 546, is by no means the least sub-

stantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death.

"In *Saltonstall v. Saltonstall*, 276 U. S. 260, a tax had been imposed by state statute on the succession to a remainder interest which had vested under a trust created before the enactment of the taxing act. It was objected that the tax was void as retroactive and hence in conflict with the Fourteenth Amendment of the Federal Constitution under the ruling in *Nichols v. Coolidge*, supra, later applied in *Untermeyer v. Anderson*, 276 U. S. 440. But by the provisions of the trust indenture a power of disposition of the remainder had been reserved to the settlor to be exercised by him at any time during his life, with the concurrence of one trustee, and we held that the freeing of the remainder of the possibility of the exercise of that power, through its termination by the death of the settlor, effected a transfer which was the appropriate subject of a succession tax and that the tax was not retroactive since the termination of the power which was prerequisite to the complete succession did not occur until after the enactment of the statute. The Court said (p. 271) :

"So long as the privilege of succession has not been fully exercised it may be reached by the tax. See *Cahen v. Brewster*, 203 U. S. 543; *Orr v. Gilman*, 183 U. S. 278; *Chanler v. Kelsey*, supra; *Moffitt v. Kelly*, supra; *Nickel v. Cole*, supra. And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the

case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen v. Wisconsin*, 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another.'

"That, it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important for it was at least doubtful whether upon the death of the settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. See *Reinecke v. Northern Trust Company*, decided this day, post, p. 339. But we think that the rule applied in *Saltonstall v. Saltonstall*, *supra*, to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor *for his own benefit*. Such an outstanding power residing exclusively in a donor *to recall a gift* after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of *such* a power at death may also be the appropriate subject of a tax upon transfers."

In the *Reinecke* case the Court held as to two trusts made in 1903 and 1910 that since there was a power of revocation upon the exercise of which the trustee was required to return *the corpus of the trust to the settlor*, the transfer though made prior to the enactment of the statute was not complete until death. The Court said:

"As to the two trusts, it is argued that since they were created long before the passage of any statute

imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of *Nichols v. Coolidge*, 274 U. S. 531. In that case it was held that the provisions of the similar Section 402 of the 1918 Act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void, as respects transfers completed before any such statute was enacted. But in *Chase National Bank v. United States*, decided this day, *ante*, p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall v. Saltonstall*, 276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence Sec. 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank v. United States*, *supra*, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed."

As to the five trusts in which a power was reserved to alter, change or modify the trust to be exercised by the settlor with one or more beneficiaries, the Court held the statute inapplicable because no power rested in him alone whereby he might by its exercise *recover any beneficial interest for himself*. The Court said:

"If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts.

He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

“Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control *over it for his own benefit* then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax.” (Italics ours.)

It is plain, therefore, as to trusts created prior to the passage of the law, that the power must not only be one residing in the settlor alone, but it must be one whereby the transfer may be revoked, and *the settlor repossessed with the interest* he had parted with. If we are correct in our interpretation of these cases it necessarily follows that the words of the paragraph, alter, ~~change~~ or revoke, must *be* read as if they were in the conjunctive and not the disjunctive.

Paragraph (d) as written is ambiguous. It speaks of "any interest * * * * where the enjoyment thereof was subject at the date of his death to *any change* through the exercise of a power," etc. The words "any change" could be construed as referring to a change however slight, but it is perfectly manifest that it was not the intention of Congress in enacting this provision to embrace transfers absolute in fact simply because there had been reserved by the transferor a power to make some slight change in the instrument of transfer. The transfers that were intended to be embraced by the language were those where the enjoyment was subject at the date of the transferor's death to the exercise of an unlimited power to make any change, even to that of revocation. It was intended to apply only where the power reserved was equivalent to a *general power of disposition*. The Act, by subdivision (f), makes provision for the taxing as part of a decedent's estate property passing under a general power of appointment, and it was to reach like interests of a decedent under reserved powers that this section was enacted. Properly construed, paragraph (d) does not apply to the Cover trust.

It is true that the power to alter, change or modify is reserved by the settlor in himself alone, but as we have pointed out, he expressly disclaimed the right to revoke; he parted forever with all beneficial interest he had possessed. He could only jointly with the trustee control the investments. He could never receive the income or any part of the principal of the trust. He might transfer from one beneficiary to another within the class of his descendants; he could not transfer from a *beneficiary* to

himself. As to his interest, the gift *was absolute*. It may be under an inheritance tax law that the privilege of succession had not been fully exercised, the gift may have been *incomplete as to the donees*, but it *was not incomplete as to the donor*.

The case of *Farmers Loan & Trust Co. v. Bowers*, 29 F. (2d) 14, fully supports the position we have taken. In that case it is true the Court, in considering the applicability of Section 402 (c) of the 1918 Revenue Law, was concerned with a trust where the power reserved to modify or *revoke* was to be exercised jointly with the trustee. But in analyzing its provisions, the Court clearly indicates that it is only a power to *repossess by revocation* that the law can deal with and that the exercise of a power to modify by changing within a class the beneficiaries, was not a transfer of the decedent's property. The Court at page 17 says:

"The August, 1919, modification provided that the principal, at the time of his death, should remain in trust for such grandchildren as were under age until their majority to the extent of their interest therein, and should then be distributed among them. The modifications made by this instrument did not change the fact that the trust had been created on May 25, 1916, and that the transfer had occurred then, and nothing *that he could do thereafter would alter or change that transaction or that trust, unless he revoked in toto the trust instrument and subsequently created a new and different trust.* (Italics ours.) The modification gave to some of the original remaindermen larger proportions than that vested in them on May 25, 1916, and took away from others of the original remaindermen portions vested in them

at that time. However, all such changes in the rights of remaindermen were made within the group originally fixed, and no persons outside that group profited thereby."

And again:

"If the settlor had completely revoked the trust, repossessed himself of the property, and made a new settlement, he would have made a transfer or created a trust within the meaning of section 402 (c) *but by the 1919 modification he changed the interest of his issue; he did not transfer his property.* Section 402 (c) refers to the extent of 'any interest,' and *this refers to an interest of the decedent.* (Italics ours.) *United States v. Field*, 255 U. S. 264, 41 S. Ct. 256, 65 L. Ed. 617, 18 A. L. R. 1461."

The Board of Tax Appeals, in the elaborate and well-reasoned opinion in *McCormick, et al., Executors v. Commissioner, etc.*, 13 B. T. A. 423, also sustains our position. The Board, after stating that since the decision by the Supreme Court in the Coolidge case they had held that gifts or transfers made prior to the Act under which the decedent died, could not be included in the gross estate, said:

"Except for an ingenious argument of the respondent we might well hold with our prior decisions which we deem in accord with *Nichols v. Coolidge, supra*, and hold that a trust created in 1918 is not to be included in the gross estate of a decedent dying under the Act of 1921. The respondent's argument, however, compels us to consider whether or not the retroactive feature condemned by the Supreme Court is present. The argument is based upon the decision of the Supreme Court of Illinois in *People v. McCormick*, 327 Ill. 547; 158 N. E. 861, construing this

trust instrument. The holding of the Supreme Court of Illinois, briefly stated, is that the beneficial interest in the property covered by the trust created by Mrs. McCormick on July 27, 1918, did not vest in her children at that time. It is argued, because the property did not vest in the children at the time the trust was created, that the transfer must necessarily have been as of the date of her death and that, therefore, the application of the act can not be said to be retroactive. There is a fatal flaw in this argument in that the Supreme Court of Illinois did not decide that Mrs. McCormick *did not divest herself of all interest in the property but merely decided that the property did not vest in her children until after her death.* The latter holding is of no assistance in determining the question which we have before us. The Supreme Court of Illinois was considering the question from the standpoint of the Illinois inheritance tax, which differs from the Federal tax in that it is a tax upon the right to receive, whereas the Federal estate tax is upon the right to transmit. We still have the question 'did Mrs. McCormick, by the instrument of July 27, 1918, *part with the possession and enjoyment of the property included in the trust.*'" (Italics ours.)

The Board answered affirmatively the question asked, and this notwithstanding the provision in the McCormick trust whereby Mrs. McCormick reserved the right to be paid a portion of the income of the trust should her income fall below \$250,000 in any year, and although the trustee had the right to accept the statements of Mrs. McCormick as to her income. The McCormick trust also had a provision whereby in the event Mrs. McCormick survived the beneficiaries, the trust would terminate and she would take the trust property.

The Cover trust reserved no such powers to the settlor. It was made in 1918, eight years prior to the enactment of the 1926 law and not in contemplation of death. It was an absolute conveyance of all interest of the settlor. Neither paragraph (c) nor (d), properly construed, embraces such a transfer.

III

IF EITHER SUBDIVISION (C) OR (D) OF SECTION 302 BE CONSTRUED TO EMBRACE SUCH A TRANSFER, IS THE ACT, SO CONSTRUED, CONSTITUTIONAL?

The argument under the second point clearly indicates that such a construction of either or both of these paragraphs would make them unconstitutional.

We are not called upon to express an opinion as to the constitutionality of these paragraphs so construed as to embrace *trusts made since the enactment of the law*, where settlors reserve a power to alter or change or modify, without any power to revoke.

If the Cover transfer was one where in 1918 there passed irrevocably from the settlor all his interest in the corpus of the trust property, then under the decision in *Nichols v. Coolidge*, 274 U. S. 531, the 1926 Act construed to embrace such transfer is unconstitutional. Even though the transfer be considered as one intended to take effect in possession or enjoyment at or after decedent's death, which we have undertaken to show is an unwarrantable conclusion, yet as it was made prior to the passage of the 1926 law, the only law applicable (*Estate of Harris*, 5 B. T. A. 41-43), the trust property may not be included in the decedent's gross estate. We have paraphrased substantially the closing sentence but one in the Coolidge case, which is as follows:

“And we must conclude that Section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious, and amounts to confiscation.”

Since the decision in the Coolidge case, one feels hardly warranted in quoting from earlier decisions of inferior courts to the same effect, and we content ourselves with merely referring to one.

In *Frew v. Bowers*, 12 Fed. (2d), 625, the same Section 402 (c) of the 1921 law was held unconstitutional as applied to the Nash trusts under which the decedent Nash *received the income for life*, with remainders over to his son and daughter. This trust had been created in 1910, and decedent had died in 1922. A writ of certiorari was granted (275 U. S. 682), but dismissed by stipulation after the Coolidge decision.

The Board of Tax Appeals has many times followed the Coolidge decision. On November 12, 1928, in the case of *Morsman etc. v. Commissioner*, 14 B. T. A. 108, it passed upon the constitutionality of Section 302 (c) of the Revenue Act of 1924, and held that it could “have no effect to include as a part of the gross estate the property transferred by a decedent on August 1, 1922.”

The Morsman trust was an irrevocable one made in 1922, whereby the income from the trust was to be paid monthly to the settlor during his life, after his death for two years to his four sons, when the trust should cease and the corpus be divided among the sons. The Board,

answering the question whether the corpus of the trust was to be included in the gross estate, said:

“Our decision as to the first issue in this proceeding is governed by *Nichols v. Coolidge*, 274 U. S. 531; *Edward H. Alsop, Executor*, 7 B. T. A. 848; and *James Duggan, Executor*, 8 B. T. A. 482. Cf. *Charles L. Harris, Administrator*, 5 B. T. A. 41, and *Wilmington Trust Co. v. United States* 28F (2d) 205. The transfer made by deceased on August 1, 1922, was made under the provisions of the Revenue Act of 1921. His death occurred on April 6, 1925. Title IV (Estate Tax) of the Revenue Act of 1921 was repealed by section 1100 (a) of the Revenue Act of 1924, approved June 2, 1924, Section 302 (c) of the Revenue Act of 1924 is identical with section 402 (c) of the Revenue Act of 1921, and section 402 (c) of the Revenue Act of 1918.

“The Supreme Court held that the latter section was invalid in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death. The transfer herein involved is of the character of that referred to in *Nichols v. Coolidge, supra*.”

CONCLUSION

In conclusion as a summary of the argument we submit:

1. That the fact that the ultimate beneficiaries under the Cover trust came into possession and enjoyment of the trust fund after the settlor's death did not make the transfer one intended to take effect in possession and enjoyment at or after his death.

2. That the transfer made by the settlor in 1918 was an absolute transfer whereby the decedent parted with all beneficial interest in the corpus of the trust. He had no interest that passed by his death, nor any beneficial interest the cessation of which by death occasioned a transfer of the trust fund *on which* an excise tax could rest.

3. That paragraph (d) of Section 302 must be construed, as to trusts made prior to its enactment, as embracing only transfers that were not so complete as to have caused a passing of all beneficial interest of the transferer.

4. That the words "to alter, ~~change~~ or revoke" must be construed in the conjunctive; that the power reserved to make any change must be such a complete power as to enable the transferer to repossess for his own benefit the property conveyed. *Law*

5. That if the provisions of paragraphs (c) and (d) of Section 302 of the Revenue Act of 1926 be construed to embrace the trust fund transferred under the Cover trust of 1918, then so construed, the Act becomes unconstitutional.

Respectfully submitted,

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deceased, Appellants.*

No. 5157

FEB 6 - 1931

Harry A. Hopkins
In the Court of Appeals of the District
of Columbia

JANUARY TERM, 1930

LORING A. COVER, JOHN M. STECK, AND HARRY R.
KERN, EXECUTORS OF THE ESTATE OF THOMAS
COVER, DECEASED, APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR APPELLEE

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In the Court of Appeals of the District of Columbia

No. 5157

LORING A. COVER, JOHN M. STECK, AND HARRY R.
Kern, Executors of the Estate of Thomas Cover,
Deceased, appellants

v.

COMMISSIONER OF INTERNAL REVENUE

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR APPELLEE

PREVIOUS OPINION

The only previous opinion is that of the United States Board of Tax Appeals (R. 18-30), which is reported in 17 B. T. A. 1177.

JURISDICTION

This case involves Federal estate taxes under the Revenue Act of 1926. The final order of redetermination (decision) of the Board of Tax Appeals was entered January 10, 1930. (R. 30.) The

jurisdiction of this court is invoked by petition for review filed February 12, 1930 (R. 31-36), pursuant to Sections 1001, 1002 and 1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110.

QUESTIONS PRESENTED

1. Where the settlor of a trust executed January 17, 1918, transferred property to a trustee, in trust, and reserved to himself the right, at any time or times during his life, to alter, change, or modify the trusts created, without the right to withdraw any part of the principal, is the value of the property comprising this trust on March 26, 1926—the date of decedent's death—to be included in the decedent's gross estate for Federal estate-tax purposes, either under Section 302 (c) of the Revenue Act of 1926, as a transfer intended to take effect in possession or enjoyment at or after decedent's death, or under Section 302 (d) of said Act?

2. If so, is the statute constitutional?

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 301. (a) * * * a tax equal to the sum of the following percentages of the value of the net estate * * * is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, * * *

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all

property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Treasury Regulations 70:

ART. 15. *Transfers during life.*—Except bona fide sales for an adequate and full consideration in money or money's worth, all transfers made by the decedent at any time are taxable if made in contemplation of or intended to take effect in possession or enjoyment at or after his death, or if the enjoyment of the property or the interest transferred was subject at the date of his death to change by the exercise of any power to alter, amend, or revoke, or if any such power was relinquished by the decedent in contemplation of his death. To constitute such a sale it must have been made in good faith, and the price must have been an adequate and full equivalent, and reducible to a money value. Where the price was less than an adequate and full equivalent only the excess of the fair market value of the property, as of the date of the decedent's death, over the price received by the decedent should be included in the gross estate. The value of property, where title was transferred by the decedent before September 9, 1916, is to be included in his gross estate only if his death occurred after the effective date of the Revenue Act of 1918.

Where a transfer, by trust or otherwise, was made by a written instrument, duplicate copies thereof should be filed with the return. If of public record, one of the copies should be certified; if not of record, one copy should be verified. Where the decedent was

a non-resident, only one copy, certified or verified, need be filed.

ART. 17. *General*.—All transfers at any time made by the decedent, other than bona fide sales for an adequate and full consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of the property so transferred must be returned as a part of the gross estate.

ART. 18 * * *

Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter to receive the income during the decedent's life or agreeing to pay the income to his mother during the decedent's life. The transfer to the son in either case is taxable.

ART. 19. *Power to change enjoyment*.—The value of property transferred, other than by a bona fide sale for an adequate and full consideration in money or money's

worth, constitutes a part of the gross estate if at the time of the decedent's death the enjoyment thereof was subject to any change through a power, exercisable either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.

STATEMENT OF FACTS

The facts found by the Board of Tax Appeals pertinent to taxpayer's assignments of error are as follows (R. 19-24) :

The appellants are the executors of the estate of Thomas Cover, who died testate March 26, 1926, a resident of Winchester, Va.

On January 17, 1918, Thomas Cover executed a deed of trust to the Safe Deposit and Trust Company of Baltimore, the material provisions of which are as follows:

Know all men by these presents:

That I, Thomas Cover, of Winchester, Virginia, do, out of the love and affection which I bear to my children and descendants and for the purpose of providing an income for them, hereby give, grant, and assign unto the Safe Deposit and Trust Company of Baltimore, a body corporate of the State of Maryland, the securities enumerated on the Schedule hereto attached and made part hereof, to be held by it for the following uses and trust purposes, that is to say:

To collect the income therefrom and after paying thereout all taxes and charges, including a commission to the Trustee for all

services under this deed of five per cent (5%) on the amount of income collected, to pay the remainder of such income on December 1st, 1918, and every six months thereafter to my children and the descendants of my deceased children living from time to time as said income is payable, such payments to be per stirpes; provided, however, that any surviving wife or surviving husband of a deceased child of mine shall, during her or his unmarried life, receive on the first day of each June and December succeeding the death of such deceased child of mine one-third of one-eighth of the net income from the Trust Estate, to be deducted from the respective shares of the income of the descendants of such deceased children, if they shall leave descendants, and, if not, then from the income of the Trust Estate. The provision for the wives and husbands of my children herein made shall be operative only if said wives and husbands shall actually have lived upon amicable and harmonious terms with my son or daughter, as the case may be, for at least one year immediately preceding the time of the death of my son or daughter, and the Trustee shall assume they have so lived together unless it shall receive notice to the contrary from me or any one of my children.

The above Trust shall continue until the death of all my children and until the youngest grandchild of mine living at my death shall reach the age of twenty-one years, when

it shall cease and the Trustee shall divide the principal of the Trust Estate among all of my descendants then living, per stirpes.

If at the termination of the Trust as above provided there shall then be living wives or husbands of any deceased children of mine, the Trustee shall retain out of the shares from which such wives or husbands shall have been receiving the income hereinbefore provided to be paid them, as much of the principal of such share as may be necessary to provide for such payments, and at their respective deaths or remarriages I direct said Trustee to divide the principal thus retained, amongst those entitled (as above provided) their personal representatives and assigns.

Power is hereby conferred upon said Trustee to vary the investments of the Trust Estate in such manner as it may deem desirable, except that during my life only with my approval, and for the convenient management of the Trust, it is authorized to have registered in its name in its sole capacity without defining thereon the Trusts, all registered securities.

All payments hereunder to my children and descendants or other distributees shall be made to them direct, into their own hands and not into the hands of another, whether claiming by their authority or otherwise, provided, however, said Trustee may during the minority of any of my descendants apply their share of the income to their support and education.

I hereby reserve to myself the right, at any time or times during my life, to alter, change or modify the Trusts hereby created, without the right to withdraw any part of the principal; any such change, alteration or modification by me to be evidenced by a paper writing under my hand and seal and lodged with said Trustee during my lifetime.

Witness my hand and seal this 17th day of January, A. D. nineteen hundred and eighteen. Executed in duplicate.

(Signed) THOMAS COVER. [SEAL.]

Certain other property was added to the trust by a deed dated January 8, 1919, and on January 17, 1919, pursuant to the power of modification reserved in the trust deed of January 17, 1918, the following instrument was executed:

Know all men by these presents that whereas, I, Thomas Cover, by my deed dated January 17, 1918, granted and assigned to the Safe Deposit and Trust Company of Baltimore, under the trusts therein set forth the property therein mentioned (and by supplement thereto dated January 8, 1919, I added further property thereto) which deed provides that the trust should continue until after the death of all of my children and until the youngest grandchild of mine surviving at my death should reach the age of 21 years and should then terminate, and under which deed I reserved to myself the right at any time or times during my life to alter,

change, or modify the trusts thereby created, without the right to withdraw any part of the principal, any such change, alteration, or modification to be evidenced by a paper writing under my hand and seal and lodged with said Trustee during my life.

Now, therefore, in pursuance of the power of alteration so reserved by me, I do hereby direct that the said Safe Deposit and Trust Company of Baltimore, Trustee, shall at any time after January 1, 1925, pay to each of my grandchildren, Thomas Cover Barton, Lewis N. Barton, Jr. and Joseph Marx Barton, Jr., upon his request in writing the sum of Ten Thousand Dollars (\$10,000) out of the principal of said estate, and I confer upon the said Trustee the power to sell such portions of the principal as may be necessary to make such payments.

And I further direct that after each of the said three sums of Ten Thousand Dollars has been paid, the said Trustee shall semi-annually on June 1st and December 1st of each year and until the termination of the trust charge the grandchild receiving said sum, or collect from him, interest at the rate of $4\frac{1}{4}\%$ per annum, the interest so charged or collected to be brought in and distributed with the other income from the trust estate and should such grandchild, so receiving said principal sum of Ten Thousand Dollars, die before the termination of the trust, the said interest shall be so charged to or collected from the persons who under the terms of

said deed shall be entitled to that share of the income now payable to him.

That upon the termination of the trusts such of the said three sums of Ten Thousand Dollars each as shall have been paid to my said three Grandchildren shall be brought into the principal of said estate and in the division thereof charged against the shares of said grandchildren, respectively. If any of them who shall have received said sum of Ten Thousand Dollars be at that time deceased, then the sum so paid him shall be charged against the persons who shall under the terms of said deed be entitled to the share of the principal which would have been payable to such grandchild if then living.

Witness my Hand and Seal this 17th day of January, nineteen hundred and nineteen.
Executed in duplicate.

THOMAS COVER. (SEAL.)

Witness:

H. H. M. LEE.

At the date of decedent's death on March 26, 1926, the above trust, as amended and modified, was in full force and effect and the trustee, the Safe Deposit and Trust Company of Baltimore, held as the entire corpus of the trust securities of a total value of \$391,920.78. At that date there had accrued income arising from such securities in the amount of \$5,249.80. The following is the stipulation of facts entered into and filed by the parties:

I

That the Deed of Trust of Thomas Cover to the Safe Deposit and Trust Company of Baltimore dated January 17, 1918, a true copy of which is filed as Exhibit C to the petition herein, was executed on that date by the said Thomas Cover and was not made in contemplation of death, and is not such a Deed of Trust as is embraced within the terms of paragraph (c) of section 302 of the Revenue Act of 1926.

II

That the Deed of Trust of Thomas Cover to the Safe Deposit and Trust Company of Baltimore dated January 17, 1919, a true copy of which is filed as Exhibit D to the petition herein, was executed on that date by the said Thomas Cover and was not made in contemplation of death, and is not such a Deed of Trust as is embraced within the terms of paragraph (c) of section 302 of the Act of 1926.

III

Whereas, it appears that there has been allowed as a credit, against the tax claimed by the United States the sum of \$51,352.69 on account of state inheritance taxes paid by said estate to the state of Virginia, such taxes having been imposed upon property other than that constituting the corpus of the said trust; and

Whereas, under the law of the State of Virginia, the State inheritance tax is fixed at a sum equal to not less than eighty (80%) per cent of the tax that shall be levied by the United States; and if the action of the Commissioner of Internal Revenue in determining that under and by virtue of subdivision (d) of section 302 of the Revenue Act of 1926 there should be included as part of the taxable estate of the said Thomas Cover, deceased, the stocks, bonds, and other securities of the value of \$391,920.78, being the corpus of the trust estate created by the said Deed of Trust executed January 17, 1918, by said Thomas Cover, to the Safe Deposit and Trust Company of Baltimore, together with certain accrued interest thereon, amounting to the sum of \$5,249.80, is upheld, and a tax in the nature of a deficiency over and beyond that returned and paid by the said estate is determined, the State of Virginia will claim, and the said estate of Thomas Cover will have to pay, an additional inheritance tax to Virginia in a sum equal to eighty (80%) per cent of the deficiency determined;

It is agreed by and between the parties hereto that in that event, against any such additional tax imposed by the United States the said estate of Thomas Cover, deceased, shall be entitled to have credited the amount, not in excess of eighty (80%) per cent of the United States deficiency tax, of any additional estate, legacy, inheritance, or succession tax imposed on any of the property so in-

cluded by the United States in the gross estate of said Thomas Cover, deceased, actually paid to the State of Virginia; *Provided*, That the same shall have been paid and credit therefor claimed within three years after December 9, 1926, the date the return of the Executors of the estate of Thomas Cover, deceased, was filed with the Collector of Internal Revenue for the District of Virginia.

Upon the foregoing findings, the Board held that the value of the property comprising the trust of January 17, 1918, as amended, must be included in the decedent's gross estate, under Section 302 (c) and (d) of the Revenue Act of 1926. From this decision, the present appeal was taken.

SUMMARY OF ARGUMENT

The reservation by the grantor of the right to alter, change or modify the trust instrument brings the transfer, in trust, within the provisions of Section 302 (c) of the statute, for the reason that the transfer of the fee estate in remainder is not fully consummated until his death.

This reservation also brings the trust within the operation of Section 302 (d) of the statute for the same reason.

As the transfer has not been fully consummated until the grantor's death, the Revenue Act of 1926 is not receiving retroactive application. The requirement that the value of property transferred in trust, under such conditions, be included in the de-

cedent's gross estate, is not subject to constitutional objection.

It is a settled rule of statutory construction that, upon the repeal of the provisions of a statute and the simultaneous reenactment of substantially the same or identical provisions, the provisions of the new Act are substituted for those of the old, and do not abrogate or annul the provisions of the original act, but continue them in force. The constitutionality of Section 302 (c) of the Act is, therefore, not open to question, if the court be of opinion that said section is applicable to the transfer here involved.

ARGUMENT

I

The value of the property comprising the trust of January 17, 1918, as amended, must be included in decedent's gross estate under Section 302 (c) of the Revenue Act of 1926 as a transfer intended to take effect in possession or enjoyment at or after death

Section 302 (c) of the Revenue Act of 1926, so far as here pertinent, prescribes that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise * * * intended to take effect in possession or enjoyment at or after his death * * *."

This provision, with no material difference in wording, is incorporated in each of the prior estate tax Acts beginning with 1916: Revenue Act of 1916, Section 202 (b); Revenue Act of 1918, Section 402 (c); Revenue Act of 1921, Section 402 (c); Revenue Act of 1924, Section 302 (c). Therefore, if Section 302 (c) is otherwise applicable, there can be no question of retroactivity, since the original legislation remains in continuous force and effect by the successive repeal and simultaneous reenactment of the earlier Act. *Campbell v. California*, 200 U. S. 87; *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 1, 11; *Steamship Co. v. Jolliffe*, 2 Wall. 450, 458.

Nor is this court concluded by that portion of the stipulation of facts providing that the deed of trust is not such an one as is embraced in Section 302 (c) of the Revenue Act of 1926. (R. 23.)

It is well settled that parties may not stipulate an issue of law and when they essay to do so the result is a nullity. *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U. S. 281, 289; *California v. San Pablo &c. Railroad*, 149 U. S. 308. Appellants tacitly recognize this principle and do not contend that the court is precluded by the stipulation from a consideration of the applicability of Section 302 (c).

For present purposes, the significant language in the trust deed is as follows (R. 21):

I hereby reserve to myself the right, at any time or times during my life, to alter, change,

or modify the Trusts hereby created, without the right to withdraw any part of the principal; any such change, alteration, or modification by me to be evidenced by a paper writing under my hand and seal and lodged with said Trustee during my lifetime.

The question is whether this reservation stamps the transaction as a “transfer * * * intended to take effect in possession or enjoyment at or after his [the settlor’s] death.”

The reservation of the right to alter, change, or modify the trust instrument gave the decedent absolute power at any time during his lifetime to cancel and annul the disposition of the property and to make another disposition thereof. In fact, by the instrument of January 17, 1919, the decedent modified the original deed of trust and made a substantially different disposition of a portion of the property transferred in trust. The decedent had until death absolute control over the fee estate and until his death it could not be determined whether the beneficiaries designated would get anything. In addition, during his lifetime the decedent could take back unto himself the entire income from the property, the economic benefits thereof, the real substance of the property. The tentative disposition made by this deed of trust was as ambulatory as a will.

In those cases wherein the power of revocation has been reserved, it is clear beyond cavil that there

is no transfer until death. But a power of revocation is only one form of the right to control. It differs from a power to alter or a power to change or modify only in degree. Where such dominion is retained over the property that the beneficiaries and the extent to which they benefit can only be determined upon the settlor's death, clearly the disposition is one which can only "take effect in possession or enjoyment" after the settlor's death and the better reasoned cases have so held.

In *Saltonstall v. Saltonstall*, 276 U. S. 260, the Court considered an inheritance tax statute and the effect of a power of appointment reserved by the donor. The Court said (p. 271):

*So long as the privilege of succession has not been fully exercised it may be reached by the tax. * * * And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by a donor leaves the transfer, as to him, incomplete and subject to tax. Bullen v. Wisconsin, 240 U. S. 625. * * * (Italics supplied.)*

Appellants urge that the beneficiaries took vested interests under the instrument in question. (Br. 13.) While appellee does not admit this conclu-

sion, it is the Government's position that the time at which the remainders vested is immaterial since "possession or enjoyment" as used in the statute refers to the period when the remainders fall in. *Saltonstall v. Saltonstall*, *supra*; *McCaughn v. Girard Trust Co.* (C. C. A. 3rd), 11 F. (2d) 520; *Frew v. Bowers* (C. C. A. 2d), 12 F. (2d) 625, 629 (concurring opinion of L. Hand); *Reed v. Howbert* (— Colo. —), 8 F. (2d) 641. *Chase Nat. Bank v. United States*, 278 U. S. 327, upon which appellants rely, is conclusive against them on this point. It is there said (p. 334-335):

It is true, as emphasized by plaintiffs, that the interest of the beneficiaries in the insurance policies effected by decedent "vested" in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent, but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. *The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic*

enjoyment may be controlled. (Italics supplied.)

In the *Chase Nat. Bank case, supra*, the Supreme Court held that where a decedent has reserved the power to change the beneficiaries named in a policy of insurance—a right which the decedent in this case certainly had—the amount paid pursuant to the policy must be included in the decedent's gross estate under Section 302 (c) of the Revenue Act of 1926.

On the same day the *Chase Nat. Bank case, supra*, was decided, the Supreme Court also decided the case of *Reinecke v. Trust Co.*, 278 U. S. 339. In that case seven trusts were involved. In five of the trusts the settlor had disposed of the entire beneficial interest in the property as well as the estate by title during his lifetime. With respect to two of the trusts *created in 1903 and 1910*, respectively, the settlor had reserved a power of revocation and had also reserved the income from the trust property to himself. Upon the authority of *Saltonstall v. Saltonstall, supra*, and *Chase Nat. Bank v. United States, supra*, the Court held that the transfer of the estate by title was not complete until the donor's death, and that the value of the property comprising the trust must be included in the settlor's gross estate for purposes of the Federal estate tax. This result was reached by reason of the fact that control over the estate by title necessarily carries with it control over the right to possession or enjoyment

arising out of ownership and brings the transfer within the provisions of Section 302 (c) of the Act as a transfer intended to take effect in possession or enjoyment at or after death. Otherwise stated, where the decedent reserves the right to amend, alter, or revoke the trust, the transfer is not fully consummated until the donor's death.

By the deed of January 17, 1918, the settlor divested himself beyond recall of the legal title to the corpus of the trust estate, but he was not thereby divested of control over the distribution of the capital of the trust upon his death. He reserved to himself a right to determine, by sealed writing lodged with the trustee during his lifetime, the course of distribution of the proceeds of the corpus of the trust estate among his children or their issue, even to the extent of excluding some of his children or their issue from a beneficial interest in the capital of the trust. Only his death could terminate the control of the course of distribution. Thus it could not be determined up to the date of the settlor's death to or among whom of his children or their issue the corpus of the trust estate would be paid and divided. To that extent the transfer was incomplete until the settlor's death. Clearly the enjoyment of the beneficial interest in the corpus of the trust estate was subject at the date of settlor's death to a change through the exercise of a power by the decedent. Since the donor reserved the absolute power to change, alter,

and modify this deed of trust until his death, the transfer was not consummated until that time and the value of the property comprising the trust must be included in his gross estate as a transfer intended to take effect in possession or enjoyment at or after his death.

As well said in *Reinecke v. Trust Co.*, *supra* (p. 348) :

In the light of the general purpose of the statute and the language of § 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in § 402 (c) "to take effect in possession or enjoyment at or after his death," include any others than those passing from the *possession, enjoyment or control* of the donor at his death and so taxable as transfers at death under § 401. * * * (Italics supplied.)

See also *Hanna, Ex'r. v. United States*, 68 Ct. Cls. 45.

Appellants in their brief (Br. 23025), rely upon *Reinecke v. Trust Co.*, *supra*, in so far as that decision related to the five trusts held not taxable, and upon *May v. Heiner*, 281 U. S. 328. In both of these cases the trust deeds involved contained no reservation of a right of the grantor to change, alter or modify the deed of trust. This clearly distinguishes those decisions from the instant case. The decision of the Board of Tax Appeals in *Cyrus*

H. McCormick, et al., Executors v. Commissioner, 13 B. T. A. 423 (quoted at length in appellants' brief, pages 34-35), becomes of no authority by virtue of its subsequent reversal by the Circuit Court of Appeals for the Seventh Circuit (43 F. (2d) 277). Certiorari has been granted. See also *McCaughn v. Carnill* (43 F. (2d) 69) and *Commissioner v. Northern Trust Co.* (41 F. (2d) 732), now pending before the Supreme Court as Nos. 628 and 534, respectively.

Appellants dwell upon the alleged controlling purpose of the settlor to provide for his children and their descendants, in an effort to prove that the deceased could not have substituted himself as a life beneficiary under the terms of the trust, and in this connection they point to the opening language of the recital in the trust deed. The language of the reservation, "*I hereby reserve to myself the right, at any time or times during my life, to alter, change, or modify the Trusts hereby created,*" is not ambiguous, and under these circumstances it must prevail over any inconsistent matters in the recital. (Italics supplied.) *Williams v. Barkley*, 165 N. Y. 48, 57; Williston on Contracts, Vol. 2, Section 619, p. 1201 note. Trusts are subject to the same rules of construction as obtain in the case of contracts generally. Perry on Trusts and Trustees, Sections 377, 390. Had the settlor desired to circumscribe his power of alteration as contended by appellants, he could readily have worded the reservation to conform to such alleged intention.

Even if it be conceded, solely for the purposes of the present argument, that the settlor was without power to alter the trust deed in his own favor, the fact remains that he still retained broad powers in the selection of the beneficiaries of his bounty and the extent to which they should participate. The ultimate recipients of his bounty could not be known during the settlor's lifetime. Appellee contends that this in itself brings the transaction within the statutory language.

II

The value of the property comprising the trust of January 17, 1918, as amended, must be included in decedents' gross estate under Section 302 (d) of the Revenue Act of 1926

The discussion under Point I of the Argument above is equally applicable in considering Section 302 (d) of the Revenue Act of 1926 and reference thereto is respectfully made.

The clear and unmistakable language of Section 302 (d) requires that there be included in the decedent's gross estate the value of any property of which the decedent had at any time made a transfer by trust or otherwise where enjoyment thereof was subject at the date of his death "to any change through the exercise of a power * * * by the decedent alone * * * to alter, amend, *or* revoke * * *". (Italics supplied.)

The provisions of the deed of trust of January 17, 1918, are as clear and unequivocal as the lan-

guage of the statute. The grantor therein reserved the right alone "to alter, change, or modify" the deed of trust. The enjoyment of the property transferred in trust was therefor at the date of the grantor's death subject to change by exercise of the power so reserved.

There are occasionally instances in which the courts are justified in altering the literal terms of a statute in order to avoid grave injustice or absurd consequences. There is no occasion for construction of this sort in the instant case and appellants have suggested no reason why the plain words of the statute should be disregarded and construed in the conjunctive rather than the disjunctive. Neither is there any precedent among the decided cases for construing the language of this section otherwise than according to its obvious import.

The fact that the settlor of a trust does or does not retain a life interest therein is not decisive of the question whether there has been a transfer intended to take effect at or after death, within the compass of the statute. Nothing in the language of the Act justifies such a conclusion; and the regulations clearly state that a transfer may be within the Act although the grantor does not reserve a life interest to himself. Article 18 of Regulations 70 is a substantial rewrite of Article 18, Regulations 68 (Revenue Act of 1924), and Article 20, Regulations 63 (Revenue Act of 1921). The successive reenactment of the same provision in the

statutes, under which these regulations were promulgated, is an implied recognition and approval of the regulatory provisions (*National Lead Co. v. United States*, 252 U. S. 140), which, not being in conflict with statute, has the force and effect of statute. *Maryland Casualty Co. v. United States*, 251 U. S. 342, 349; *Brewster v. Gage*, 280 U. S. 327.

The vital question is, when was the transfer completed? A right of control residing in the grantor after the transfer is not compatible with a completed transfer. In the instant case it is quite apparent that the transaction was not wholly complete and beyond recall after the execution of the trust deed. The decedent retained absolute control over the subject matter of the trust in all respects with the possible exception that he could not withdraw the principal of the trust fund. He could change the beneficiaries, their shares and interests, and also the time at which the trust should terminate. The power to control the shifting of the economic enjoyment of property is properly the subject of a transfer tax. It is clear in this case that the settlor had control over the possession and enjoyment of the property by virtue of the reserve power which enabled him to shift the economic bequests under the trust. At his death upon the non-exercise of that power the legal and equitable title vested completely in the beneficiaries designated and a transfer occurred which is properly subject to the Federal estate tax. The settlor's death ren-

dered complete and absolute the transfer of the property which, prior to that time, was not complete.

This line of reasoning underlies the decision of the Supreme Court in *Chase Nat. Bank v. United States, supra*, and *Sargent v. White, Collector (Mass.)*, decided December 16, 1930, not officially reported, but may be found in Prentice Hall Federal Tax Service, 1931, Vol. I, pp. 494-495. It is also the basis of the decision of the District Court for the District of Maine in *Brady v. Ham*, 38 F. (2d) 659, which is analogous in its facts to the case at bar. *Brady v. Ham* was reversed by the Circuit Court of Appeals for the First Circuit on November 26, 1930, in a decision not yet reported but see C. C. H. 1930, Vol. III, p. 9299. In the decision of this court, Judge Anderson rendered concurring opinion, in which he recorded his doubt as to what the Supreme Court will ultimately hold. The matter of application for a writ of certiorari in this case is now being considered.

III

If the court determines that the property here transferred should be included within Section 302 (c) or Section 302 (d) of the statute, the statute is not to that extent unconstitutional

It should be noted, in passing that the courts will indulge every possible presumption in favor of the validity of an Act of Congress. *Sinking-Fund*

Cases, 99 U. S. 700, 718; *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 390.

In so far as this aspect of the case is concerned, appellants rely largely on *Nichols v. Coolidge*, 274 U. S. 531. In that case the decedent had transferred *both* the beneficial interest in the property and the estate by title prior to the enactment of the Revenue Act of 1918, which Act first contained the specific retroactive provision as to transfers, and the Supreme Court held that where both legal and equitable estates had been transferred “*before any such statute was enacted*” and the transfer was not made in contemplation of death, the value of such property was not to be included in decedent’s gross estate and that an attempt to bring property completely transferred prior to the enactment of the statute within its terms would render the same unconstitutional.

The obvious difference in the facts between the *Coolidge case* and the case at bar renders further elaboration unnecessary.

Mere retroactivity in and of itself is not objectionable in taxing statutes. It has frequently been pointed out that all the income tax Acts since the enactment of the 16th Amendment have included retroactive features. What is objectionable is the application of a retroactive statute in such a way as to cause an “arbitrary, whimsical, and burdensome tax” in the particular case. The few instances, such as *Nichols v. Coolidge*, *supra*, where

the courts have invalidated an application of the statute for this reason, it will be noted that the past transactions have been wholly complete and beyond recall.

As to this phase of the case appellee relies primarily on the fact that the transfer was not complete until the death of the settlor, which occurred after the passage of the Act, and under these circumstances the statute will not be invalidated for retroactivity. The Government's position in this respect find ample support in *Cahen v. Brewster*, 203 U. S. 543; *Reinecke v. Trust Co.*, *supra*; *Tyler v. United States*, 281 U. S. 497, and *Bank of New York & Trust Co. v. Commissioner*, 20 B. T. A. 677. In so far as Section 302 (c) is concerned, it has already been pointed out that this section, with immaterial changes in wording, had been in continuous effect for ten years prior to the passage of the Revenue Act of 1926. Hence, if otherwise applicable, it could not be subject to constitutional objection on this ground.

The case of *Morsman v. Commissioner*, 14 B. T. A. 108, relied upon by appellants in this connection was reversed by the Circuit Court of Appeals for the Eighth Circuit on November 10, 1930. The decision has not yet been reported.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Board of Tax Ap-

peals with respect to the trust of January 17, 1918,
should be affirmed.

Respectfully,

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JANUARY, 1931.

